



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1403/16

In the matter between:

AMCU obo KELEBOGILE VALERIE BOTSHELENG

Applicant

And

MOTHUSI MAJE, N.O.

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

ASSMANG IRON ORE (KHUMANI MINE)

Third Respondent

Heard: 01 March 2023

Delivered: 09 January 2024

JUDGMENT

VOYI, AJ

- [1] This is an application, by AMCU acting on behalf of Ms Kelebogile Valerie Botsheleng (Botsheleng), to review and set aside an arbitration award issued by the first respondent, Commissioner Mothusi Maje (Commissioner) on 01 June 2016 under case number NC2730-15.

- [2] The application for review is launched in terms of section 145 of the Labour Relations Act¹ (the LRA). It is opposed only by the third respondent, being Assmang Iron Ore (Khumani Mine) (Assmang). The Commissioner and the second respondent, being the Commission for Conciliation, Mediation and Arbitration (CCMA) elected to abide by the decision of this court.
- [3] Botsheleng was dismissed by Assmang for misconduct on 19 August 2015. The charges of misconduct for which she was found guilty and ultimately dismissed were two, namely: (a) failure to follow company safety policy and procedure by putting the safety of yourself and other employees at risk on 24 May 2015, and (b) dishonesty by giving incorrect accident information during the investigation by claiming that she had a blackout at the time of the accident.
- [4] After her dismissal and with the assistance of AMCU, Botsheleng referred an unfair dismissal dispute to the CCMA. Conciliation failed and the dispute proceeded to arbitration.
- [5] The unfair dismissal dispute was arbitrated by the Commissioner on 06 April 2016 and the proceedings became part-heard, only to be concluded on 25 May 2016. Shortly thereafter, the Commissioner issued the arbitration award which is the subject of the present review proceedings.
- [6] In the arbitration award being challenged in these review proceedings, the Commissioner took the decision that the dismissal of Botsheleng by Assmang for the aforesaid charges of misconduct was both substantively and procedurally fair.
- [7] In support of the decision he took, the Commissioner reasoned as follows:

'65. I have accepted [Assmang's] reasons for establishing the rule and prescribing the penalty for breach of the rule. It is not up to me to set aside [Assmang's] disciplinary standards merely because I would

¹ No. 66 of 1995, as amended.

have preferred different standards. I further respect the fact that [Assmang] has a greater knowledge of the demands of the business than I do.

66. I have taken into account not what the sanction should have been, but whether [Assmang's] decision to dismiss was fair. It was the evidence of [Assmang's] witnesses that the company's disciplinary code prescribes dismissal as a penalty for the alleged transgression and that the company had in the past dismissed employees found to have committed the same misconduct.

67. In this instance, I believe dismissal to be appropriate, and I find [Botsheleng's] dismissal to be procedurally and substantively fair.'

[8] Prior to commencement of the arbitration proceedings on 06 April 2016, AMCU and Assmang convened a pre-arbitration meeting and thereafter signed a minute of the said meeting. In the minute, it was agreed between the parties that the procedural fairness of Botsheleng's dismissal is not in dispute and will therefore not be challenged. With regard to substantive fairness, the following is recorded in the signed minute:

'3. Substantive fairness

3.1 Was there a workplace rule in place?

Yes

3.2 Was the rule standard / valid or reasonable?

Yes

3.3 Was the employee aware of the rule or could reasonably be expected to have been aware of the rule?

Yes

3.4 Is the rule or standard consistently applied?

No – Inconsistency exist

3.5 whether dismissal was an appropriate sanction?

No it was not.'

[9] In the arbitration award, the Commissioner identified the issues in dispute as follows:

- '9. [Botsheleng] submitted that she challenges the inconsistent application of the rule in the workplace and the appropriateness of the action, as a dismissal.'

[10] In making a determination on the inconsistency challenge, the Commissioner arrived at the following findings:

- '63. I therefore conclude that even where the issue of consistency is considered, by having regard to the record of evidence; [Botsheleng] has not established any case of inconsistency on the facts of this matter, or in terms of the relevant principles of law. Any other issue of inconsistency thus cannot affect the outcome in this matter and cannot serve as substantiation in this matter.
64. [Botsheleng] did not lead any evidence including the records existed of any disciplinary action on the charges similar to the preferred charges against her and employees concerned who were disciplined for the same or similar misconduct.'

[11] In the founding affidavit in support of the application for review, AMCU asserts that the Commissioner simply accepted, "...without any evidence to support the allegation that there was an element of dishonesty from [Botsheleng's] side, alternatively without evidence sufficient to satisfy a balance of probabilities, that [Botsheleng] was dishonest in any way."² For this and other reasons stated in the said affidavit, it is contended by AMCU that the Commissioner's award is susceptible to review.

[12] When the matter was argued before me, the crisp issue that was brought to the fore was whether the Commissioner was bound by the minute of the pre-arbitration meeting with regard to what he had to determine. According to Assmang, AMCU did not dispute that Botsheleng was guilty of the misconduct which resulted in her dismissal. Assmang therefore argued that the

² At para 8.4 of the founding affidavit.

Commissioner was, in view of the signed minute, not required to determine whether Botsheleng had committed the misconduct. The position taken by Assmang is that AMCU did not dispute, during the arbitration proceedings, that Botsheleng had committed the misconduct which resulted in her dismissal.

[13] Much to my astonishment, it was argued before me, on behalf of AMCU, that the Commissioner should have found that he was not bound by the minute of the pre-arbitration meeting. In developing this argument, counsel for AMCU contended that the Commissioner should have delved into whether or not Botsheleng had committed the misconduct for which she was dismissed.

[14] When I consider the parties' respective cases in this review, it becomes clear to me that this matter brings into sharp focus the status of a minute of a pre-arbitration meeting. It is crystal clear to me that the minute signed by the parties prior to commencement of the arbitration proceedings limited the issues for determination by the Commissioner to only the inconsistency challenge and the appropriateness of the sanction of dismissal. The Commissioner himself was alive to this fact. At the outset, he conveyed to the parties his appreciation of the issues he had to determine by placing the following on record:

'What is placed in dispute here is the rule and standard was not consistently applied and as well the dismissal was not an appropriate sanction. How I would like to bring to your attention as well again that the only two issues that are in dispute that I must determine on, is that the rule was not consistently applied, and dismissal was not an appropriate sanction.'³

[15] In my considered view, the argument advanced on behalf of AMCU is destitute of merit. It is axiomatic that a minute of a pre-arbitration meeting or a pre-trial conference is binding on the parties. In *National Union of*

³ At pages 1 and 2 of the Transcript of the arbitration proceedings of 06 April 2016.

*Metalworkers of South Africa v Driveline Technologies (Pty) Ltd*⁴, Conradie JA held thus:

‘It is true, of course, that a pre-trial agreement is a consensual document which binds the parties thereto and obliges the court (in the same way as the parties’ pleadings do) to decide only the issues set out therein. In particular, a party who agrees to claim only limited relief would be bound by his agreement...’

[16] On the crisp issue before me, it being whether the Commissioner was bound by the minute of the pre-arbitration meeting, the law is therefore clear.⁵ I accordingly have no hesitation in rejecting the argument advanced on behalf of AMCU to the effect that the Commissioner committed a reviewable irregularity in limiting the issues he had to determine to only those identified in the minute of the pre-arbitration meeting. Quite to the contrary, what could, in my considered view, amount to a reviewable irregularity would be for a CCMA commissioner to disregard the content of a minute of a pre-arbitration meeting and determine an issue the parties have excluded from the purview of his consideration.

[17] It is therefore my judgment that the Commissioner did not commit any reviewable irregularity in determining only the two issues that were identified in the minute signed by the parties at arbitration. The following passage in *South African Breweries (Pty) Ltd v Louw*⁶ should make the point even more abundantly clear:

‘The chief objective of the pre-trial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute – cum – agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A

⁴ 2000 (4) SA 645 LAC) at para 16,

⁵ See: *Putco Limited v Transport And Allied Workers Union of South Africa and Another* (J 2578/10) [2015] ZALCJHB 42 (18 February 2015) at para 26. See also *Kunene v Sithole NO and Others* (JR879/18) [2021] ZALCJHB 196 (27 July 2021) at para 16.

⁶ (2018) 39 ILJ 189 (LAC) at para 8.

minute, quite properly, may contradict the pleadings, by, for example, the giving an admission which replaces an earlier denial. When, such as in the typical retrenchment case, there are a potential plethora of facts, issues and sub-issues, by the time the pre-trial conference is convened, counsel for the respective litigants have to make choices about the ground upon which they want to contest the case. There is no room for any sleight of hand, or clever nuanced or contorted interpretations of the terms of the minute or of the pleadings to sneak back in what has been excluded by the terms of a minute. The trimmed down issues alone may be legitimately advanced. Necessarily, therefore, the strategic choices made in a pre-trial conference need to be carefully thought through, seriously made, and scrupulously adhered to. It is not open to a court to undo the laces of the strait-jacket into which the litigants have confined themselves.'

- [18] The above being the view I also take on the matter, I equally find no fault with the Commissioner's decision with regard to the two issues he was called upon to determine. The inconsistency challenge was not pursued in argument before me. I therefore need not entertain this aspect of the matter. The test on review is trite,⁷ so is the fact that the threshold is extremely high.
- [19] The Commissioner's finding that dismissal was an appropriate sanction for the misconduct committed by Botsheleng is, in my considered view, reasonable. The Commissioner's reasoning in justifying the decision he arrived at is, to me, eminently sound.
- [20] Accordingly, it is my conclusion that the Commissioner's decision with regard to the substantive fairness of Botsheleng's dismissal cannot be said to be one that that a reasonable decision-maker could not reach. The present application for review must therefore fail.
- [21] As for the costs of this application, I find no reason warranting the dismissal of the application with costs against AMCU. Accordingly, and in the exercise of my discretion, I make no order as to costs.

⁷ *Taguzu v Commission for Conciliation, Mediation and Arbitration and Others* (JR1785/18) [2023] ZALCJHB 197 (27 June 2023) at para 9. See also: *Nyathikazi v Public Health and Social Development Sectoral Bargaining Council and Others* [2021] 8 BLLR 778 (LAC) at para 21.

[22] Therefore the following order is made:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

N P Voyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv L Hollander

Instructed by:

LDA Attorneys Incorporated

For the Third Respondent:

Adv M van As

Instructed by:

Cliffe Dekker Hofmeyr Inc.

LABOUR COURT