

IN THE LABOUR COURT OF SOUTH AFRICA(HELD IN JOHANNESBURG)CASE NO: JA29/2007

In the matter between

SOUTH AFRICAN BREWERIES

Applicant

10 and

WELLINGTON MOTHATA

Respondent

J U D G M E N T

ZONDO JP: This is an appeal from a judgment of the Labour Court, in terms of which that court reviewed and set aside an arbitration award that had been issued by the third respondent, a Commissioner of the Commission for Conciliation Mediation and Arbitration in a dispute between the appellant and the first respondent about the fairness or otherwise of the dismissal of the first respondent by the appellant from its employ.

In terms of that arbitration award, the third respondent found that the first respondent was guilty of lying to Mr Mohamed of the Human Resources department of the appellant and that the dismissal was fair or dismissal was a fair sanction for the misconduct.

The first respondent was aggrieved by that arbitration award and

brought an application in the Labour Court to have the award reviewed and set aside.

As I have already indicated, that application was successful and the Labour Court reviewed and set aside that award. In addition, the Labour Court ordered the appellant to reinstate the first respondent with the retrospective effect to the date of dismissal and to pay the first respondent's costs.

The Labour Court subsequently granted the appellant leave to appeal to this Court. Before I deal with the appeal, it is necessary to set
10 out the facts as they emerge from the evidence given by the parties in the arbitration.

In this regard, it is necessary to point out that most of the relevant facts are not in dispute between the parties. The appellant in this matter is South African Breweries Limited, a well known company about which it is not necessary to elaborate. It operates from various parts of the country, including Polokwane in the Limpopo province.

The first respondent is Mr Wellington Mothata, a former employee of the appellant about whom I shall say more shortly.

The second respondent is the
20 Commission for Conciliation Mediation and Arbitration (the CCMA). The third respondent is Mr Jonas Shipalama, a Commissioner of the CCMA who arbitrated the dispute between the appellant and the first respondent about the fairness, or otherwise of the first respondent's dismissal, which is the subject of the litigation which has led to this appeal.

The first respondent had been employed by the appellant for 17 years when he was dismissed in September 2004. He was based in

Polokwane at the time of his dismissal. In 2000 the appellant had entered into a contract with the first respondent in terms of which for a period of 4 years, the first respondent was going to pursue a program that would lead to his qualifying as an artisan. Some of the training was on the job training, whereas another part of his training was theory, which was to be dealt with at a training institute in Kyalami in Johannesburg.

It would seem that from around July, if not earlier, of 2004 the first respondent was attending his training at the training institute referred to earlier in Johannesburg and was therefore not in Limpopo where he was
10 normally based. It would further seem that before the first respondent left Polokwane, the appellant intended to convene a disciplinary enquiry in which he would have to answer an allegation that he had said that a certain manager was racist. This emanated from his dissatisfaction with the finding made by that manager in connection with a grievance or complaint that he, that is the first respondent, had lodged internally in the company alleging certain irregularities perpetrated, according to him, by certain employees or managers within the company.

The first respondent left Polokwane before that disciplinary enquiry could be convened. Consequently, after the first respondent had
20 left Polokwane for his training in Johannesburg, the appellant made attempts to have the disciplinary enquiry convened during a time before the first respondent would complete the period of training that he was to spend in Johannesburg.

The first respondent adopted the attitude that the disciplinary enquiry should not be convened until he had completed his training in Johannesburg and was back in Polokwane. He said he wanted to focus

or concentrate on his training, or on the preparation for his test that he would write at some stage when he was still in Johannesburg. He put this in an email dated 19 July 2004. That email read as follows:

“Kindly be informed that due to the change in trade testing system in Oliphant’s and further the untimely resignation of millwrights facilitator a lecturer, Daniel Nthai, by the end of July 2004, I am obliged to prioritise to do the job which are more on the mechanical side first as I will be amongst those who will first be tested, based on the new system. I will then
 10 need more time so that I should endeavour to cover the mechanical scope before he leaves. And I propose that the hearing be moved to the third week of September 2004.

Your cooperation in this regard will be highly needed.”

The appellant subsequently accepted the above reason as valid not to have the disciplinary enquiry set down before September 2004. The next event that took place happened on 5 August 2004. Mr Mohamed who as I have indicated, is or was in the Human Resources department of the appellant and referred to himself in the evidence as a Human Resources Specialist in the employ of the appellant in Limpopo
 20 and the first respondent had a telephone conversation, actually two or even three telephone conversations on that day. There is no significance to whether it was two or three telephone conversations that the two men had. The first was a call made by the first respondent to Mr Mohamed about a request for a loan that he had made to the appellant for his child.

It is common cause that in one of the telephone conversations,

Mr Mohamed asked the first respondent whether the latter would

be available if the pending disciplinary enquiry was set down for 10 August 2004. The first respondent's answer was to the effect that he was not available and he referred Mr Mohamed to his email of 19 July 2004 to which I have already referred. Mr Mohamed accepted this and did not pursue the matter of the setting down the disciplinary enquiry for 10 August 2004.

I shall deal later with the detail of the first respondent's response to this suggestion or enquiry by Mr Mohamed. Mr Mohamed had thought that, since it was going to be a long weekend, the first respondent would
10 be paying a visit to his family in Polokwane and could, therefore, delay his return to Johannesburg by a day or two and attend the disciplinary enquiry.

It is common cause that at some stage on 5 August 2004 Mr Mohamed received a notification from the Food and Allied Workers Union that that union would have a meeting in Port Elizabeth from the 10th to 14 August 2004 and that the union was asking that the first respondent be released to attend that meeting. At this stage I must point out that the first respondent was a shopsteward of the Food and Allied Workers Union in the appellant's plant in Polokwane.
20 The first respondent suggested in his evidence that his telephone conversation with Mr Mohamed was after 12:00 whereas Mr Mohamed testified that the conversations were all in the morning.

Although the first respondent suggested that when he and Mr Mohamed spoke on the telephone on 5 August 2004 about the possibility of setting down the disciplinary enquiry referred to earlier on, Mr Mohamed had already received the notification from the union about

the Port Elizabeth meeting. I am prepared for purposes of this judgment to assume, without deciding, that the conversations took place in the morning and before Mr Mohamed received the notification.

It is common cause that the evidence on record does not reveal that after receiving the notification, Mr Mohamed took any steps to speak to the first respondent about such notification nor about the meeting or about what they had discussed earlier in one of the telephone conversations, in the light of the notification from the union about the meeting in Port Elizabeth.

10 I have already pointed out that the notification from the Food and Allied Workers Union was to the effect that the company was being asked to release the first respondent to attend that meeting in Port Elizabeth which was to take place from the 10th to 14 August.

 According to Mr Mohamed it came to his attention during the week of 13 August, that is during the week when the union meeting in Port Elizabeth was taking place, that the first respondent was not at the training institute in Johannesburg. This occurred because apparently somebody at the institute was looking for the first respondent, wanting to give him another room, but could not find the first respondent and an
20 email was then sent to the appellant's plant in Polokwane. The fact of the matter is that the first respondent was in Port Elizabeth at the time attending the union meeting referred to earlier. This was the meeting about which Mr Mohamed had been notified by way of the letter or notification of 2 August on 5 August 2004.

Notwithstanding the fact that Mr Mohamed had read that notification on 5 August 2004, his evidence in the subsequent arbitration was to the

effect that prior to the week of 13 August, he was not aware that the first respondent was attending the union meeting in Port Elizabeth during that week and was therefore not at the training institute. It would also seem that Mr Mohamed, after receiving the notification of the union meeting in Port Elizabeth on 5 August, did not expressly grant any permission for the first respondent to attend that meeting.

The first respondent testified that, before he went to attend the union meeting in Port Elizabeth, he had asked a Mr Hadebe from the institute for permission to attend the union meeting. It would seem that he got such
10 permission on 5 August 2004.

The first respondent testified that he was telephoned at some stage on 5 August by the union's regional office about the union meeting in Port Elizabeth the following week and was furnished with a notification of such meeting. He testified also that he then made arrangements that the notification to the plant management in Polokwane dated 2 August referred to earlier; be emailed to the plant and he spoke to a Mr Mtabane, a shopsteward and asked him to go to a certain fax machine and take that notification and make sure that Mr Mohamed received it. This evidence by the first respondent was not challenged nor contradicted.

20 Mr Mohamed testified that when during the week of 13 August, he learned that the first respondent was not at the institute and was attending the union meeting, he thought that the first respondent had lied to him when he had spoken to him on 5 August about scheduling a disciplinary hearing for 10 August.

I shall say shortly what Mr Mohamed said he believed the first respondent had lied about. He regarded the first respondent as having committed an act

of dishonesty and instituted disciplinary proceedings against the first respondent.

The allegation of misconduct that was preferred by the appellant against the first respondent was framed in the following terms:

10 "It is alleged that you are guilty of dishonesty; in that on or about 5 August 2004, you lied to Rodney Mohamed (HRS which would stand for Human Resources Specialists); in regard to your availability for a disciplinary hearing on 10 August 2004, stating that you will be at TI, that is the Training Institute; preparing for your trade test; knowing that you will be attending a union meeting in Port Elizabeth from the 10th to 14 August 2004. Subsequently a disciplinary enquiry was convened, evidence was led and the first respondent was found guilty and dismissed."

20 As I indicated earlier on, he was aggrieved by that dismissal and subsequently referred the dispute about the fairness or otherwise of the dismissal to the CCMA for arbitration. And the result of that arbitration is or was as indicated earlier on in this judgment. It is important to bear in mind exactly what the allegation was that the first respondent faced in the disciplinary enquiry and I have just quoted the actual charge that he faced. I wish to draw attention in regard to that charge to the fact that it seems to be saying that what he lied about was that he would be at TI, that is at the Training Institute, preparing for his trade test, knowing that he would be attending a union meeting in Port Elizabeth.

In his evidence in the arbitration, the first respondent admitted that at the time that he spoke to Mr Mohamed on 5 August 2004, he was aware of the

fact that there was going to be a meeting in Port Elizabeth and that he was required to attend that meeting.

It is that knowledge, it seems, that the appellant relied on to say that he lied because he knew that he was going to be at the union meeting in Port Elizabeth. But, as I have indicated, it is very important to bear in mind exactly what the charge was and what he is alleged to have lied about.

In order to establish whether or not the evidence that was led before the arbitration proved that the first respondent lied as alleged, it is necessary to look at the evidence that was given by Mr Mohamed, because obviously,
 10 only Mr Mohamed and the first respondent could tell the Arbitrator exactly what the first respondent said to Mr Mohamed in that conversation.

I have indicated earlier on that the conversations that took place between Mr Mohamed and the first respondent commenced with a telephone call that was made by the first respondent to Mr Mohamed about the loan for his child that he had requested, and he wanted Mr Mohamed to make a follow up to establish exactly what was going on about it and according to Mr Mohamed, when he later on returned to the first respondent to give him a report back on the issue of the loan, he raised the issue of the setting down of the disciplinary enquiry.

20 In his evidence, Mr Mohamed was asked what happened when he reverted to the first respondent about the loan and he said and I quote his evidence and I take it from Volume 1 at page 49 at the right corner of the page at the top; and Mr Mohamed said:

“In our telephonic discussion I gave him (the first respondent) feedback in terms of the loan and then I asked if he was going to be available for the hearing after the long weekend. He then

informed me that he wants to prioritise as per his previous, he sent to me a previous mail when I requested that he have it. He said that he wants to concentrate fully on his trade test, he does not want any interruptions. Because the company has invested a lot of money in the trainee, obviously you know it is important for the employee to get his trade test. So then I said it is fine. Being a long weekend, I wanted to find out has he changed his position in terms of that. And then he is asked, he had told you previously that he wanted to concentrate on his –

10 and then Mr Mohammed answers; concentrate, it is a six week period. And then later on, Mr Mohammed said; because it is a long weekend he is going to be coming up if has changed his mind in terms of his previous email, if he could make himself available for the disciplinary issue. He then informed me; no, as per my previous mail, I want to concentrate on my training and I was also aware of staff shortages, because there was a lot of turnover at TI; he indicated to me.”

The first respondent also gave evidence and the gist of his evidence was that he was aware of the union meeting that was scheduled for the 10th

20 to 14 August and that he was required to attend it. And that what he said to Mr Mohamed in the telephone conversation in question on 5 August was effectively to refer him to the position he had taken in his email of 19 July, which I have quoted in full earlier in this judgment.

When one has regard to the evidence that was given by Mr Mohamed and the evidence that was given by the first respondent; it is quite clear that the position taken by the first respondent, in relation to the

enquiry from Mr Mohamed on 5 August, was to say: please refer to my email of 19 July; the reasons which I gave in that email, as to why the disciplinary enquiry should be held in September still stand. He did not put it in those terms, but there can be no doubt when one reads his evidence carefully and reads that of Mr Mohamed that that indeed was what he was saying. And indeed just as previously, the company had accepted that as a valid reason not to hold the disciplinary enquiry before September. Mr Mohamed on this occasion on 5 August also accepted that the disciplinary enquiry would have to wait.

10 The charge that the first respondent faced in the disciplinary enquiry was that he had lied in that he had said that he would be at the training institute. Now, that could only be a lie if it means that he said he was going to be in Johannesburg at the Institute on 10 August; namely the date which Mr Mohamed wanted for the disciplinary enquiry.

 There is absolutely no evidence that the first respondent said to Mr Mohamed that on 10 August he would be in Johannesburg at the training institute. What he said was; I stand by the reasons that I gave in my previous email; namely that of 19 July; don't schedule the disciplinary enquiry before September.

20 If the first respondent lied or intended to hide from Mr Mohamed the fact that he was going to be at the union meeting in Port Elizabeth on the 10th, one would have to find the motive for him to lie about that. Counsel for the appellant was asked during argument what he submitted would have been or was the first respondent's motive for lying. Counsel for the appellant had difficulty with making a submission about what the motive was. Indeed, when one has regard to what the first respondent did, in order to try and

ensure that Mr Mohamed got notified about the union meeting in Port Elizabeth and that he sought to be released to attend that meeting, it becomes very difficult to say that the first respondent intended to or did lie about the meeting, or did have a motive for hiding the fact that he was going to attend the union meeting.

The evidence which I have already indicated earlier on, by the first respondent was that he emphasised to Mr Mtabane, one of the shopstewards that Mr Mtabane should make sure that Mr Mohamed got the notification from the union, which was to the effect that the union was asking
10 Mr Mohamed or the company to release the first respondent to attend that meeting. If the first respondent did not want Mr Mohamed to know about the meeting, and that the union wanted him to attend the meeting, he would not have wanted Mr Mohamed to be aware of that meeting. Furthermore, there was evidence by the first respondent that in the past, Mr Mohamed or the company had never refused to whenever he needed to go and attend a union meeting.

Indeed, Mr Mohamed in his evidence was asked whether there would have been any motive for the first respondent to lie with regard to attending that meeting. And Mr Mohamed's answer was that the first
20 respondent had no motive to lie, because he had always released him. It is true that, on the one hand, the first respondent gave evidence to the effect that he did not need permission from the management for him to attend the meeting but it is quite clear, when one reads the notification from the union, as well as when one reads the collective agreement between the appellant and the Food and Allied Workers Union that permission is required. And to that extent the first respondent must have been mistaken about that. But the

first respondent gave evidence that he did obtain permission from Mr Hadebe. And therefore, he did not go to the union meeting without anybody knowing about it. He might have got permission from a wrong person. Indeed that submission was made on behalf of the appellant. But it does not appear that the appellant took that issue seriously, because if it had taken it seriously, I have no doubt that it would have added a second charge in his disciplinary enquiry, namely attending a union meeting without permission. The fact of the matter is that the appellant did not charge the first respondent with misconduct in terms of attending the union meeting
10 without permission from the person who was supposed to give such authority.

If the first respondent was dishonest, he would have had to misrepresent the facts to Mr Mohamed intentionally. He could not be dishonest if he acted negligently. Accordingly, one has to look at his own subjective state of mind and there is absolutely nothing in the evidence that was led before the Arbitrator to suggest that in his own mind subjectively, he intended to mislead or misrepresent any facts to Mr Mohamed.

It seems to me that Mr Mohamed misconstrued what the first respondent said to him. It may well be that, if Mr Mohamed had rejected the reason advanced by the first respondent in his email of 19 July for saying
20 that the disciplinary enquiry should not take place before September; it may well be that if Mr Mohamed had rejected that reason, the first respondent might have said to Mr Mohamed in any event, there is another reason; I have a union meeting to attend. But, that stage was not reached, because Mr Mohamed accepted the first reason advanced, namely the reason that he had always advanced in terms of his email of 19 July.

I have dealt with this matter in the manner in which I have dealt with it fully conscious of the fact that the matter that was before the Labour Court was a review application. And therefore the Labour Court was not dealing with the matter as a court of first instance. And that this court should also deal with the matter on the same basis, because it was the Arbitrator who was the tribunal of first instance to deal with the matter.

But, it becomes then necessary to look at the review application and decide whether or not the court *a quo* was correct in the conclusion that it reached, namely to grant the review application and set aside the arbitration
10 award.

When one has regard to the founding affidavit in the review application; one of the complaints advanced by the first respondent is to be found in paragraph 7.8 of the founding affidavit and it reads as follows:

“The third respondent which is the Commissioner, failed to consider whether in the circumstances of the case, the sanction of dismissal was justified in the disputed event that I was found to have lied to the first respondent. I submit that even in that event, the third respondent should have found that my misconduct was not of such a serious nature as to warrant
20 a dismissal regard being had to the fact that I served the first respondent faithfully and diligently for a period of over 17 years uninterrupted.”

This complaint by the first respondent refers to the arbitration award and how the Commissioner dealt with the matter. The Commissioner deals with substantive fairness from the last paragraph of page 18 of his award; which is page 24 of the record, which is to be found in

Volume 1. In that last paragraph, he first deals with the arguments advanced by the parties. And then he says: "The applicant also confirmed under cross examination that he knew on 5 August when he spoke to Mr Mohamed that on the 10th he would be attending a meeting in Port Elizabeth and therefore would not be in Johannesburg. However, the applicant's defence is that he did not have to seek permission from Mohamed but from Hadebe which he did. Therefore, he did not commit any misconduct. However, if that was the case that it was not necessary for the applicant to obtain

10 Mohamed's permission, why did the union have to waste its resources and fax a letter to Polokwane Brewery. Further, why did the applicant go to such lengths as asking Adone Mtabane to make sure that Mohamed personally receives the fax pertaining to his release and the meeting in the Port Elizabeth."

That of course relates to the issue of permission, but then later on in page 25 the Commissioner says; "Overall, I found the respondent's case to be more probable than that of the applicant. I therefore find that the applicant lied to Mr Mohamed and thereby been dishonest about the real reason for unavailability for the disciplinary hearing on

20 10 August 2004. I therefore find that the company succeeded in proving that it had a fair reason to dismiss the applicant as required in terms of Section 188(1)(a) of the LRA."

It is quite clear that in his award the Commissioner did not after finding that the first respondent had lied to Mr Mohamed, asked the question whether or not, or expressly asked the question, whether or not dismissal was an appropriate sanction in the circumstances of the case. And in regard

to that question, of course he would have had to have regard to all such mitigating circumstances as they were before him one of which was that the first respondent had served the appellant for about 17 years without any interruption.

Counsel for the appellant submitted before us that the fact that the Commissioner did not in his award refer expressly to that part of the enquiry where he was supposed to deal with the question whether or not dismissal was a fair sanction in the circumstances, did not mean that he did not consider it.

10 It is true that Commissioners are not required in terms of the Act to give lengthy reasons for their award, for obvious reasons. And it is true that there will be cases where a Commissioner has not referred to a specific factor that he took into account, in his award but, nevertheless, can be taken to have taken into account.

However, in those cases where the aspect that the Commissioner did not deal with expressly in his award, is quite critical, it would be difficult to say why the Commissioner would leave out of his award a critical aspect of the case that he was supposed to consider.

20 In my view, the question of whether or not, if an employee is guilty of misconduct, the sanction of dismissal is a fair sanction, is a critical matter. Indeed, in this case it was a critical issue. And the fact that the Commissioner did not expressly deal with it, it seems to me is indicative of the fact that he did not consider it. And failure to consider it was a gross irregularity, because he should have considered it.

But apart from that, the Commissioner in his award dealt with the matter on the basis that the evidence by the first respondent and that of

Mr Mohamed about what the first respondent said to Mr Mohamed was materially different. The fact of the matter is that, the evidence of the two witnesses was not really materially different. Construed properly, they both said that the first respondent's response to Mr Mohamed, when Mr Mohamed asked him whether he was available for 10 August; was effectively to refer him to the reason advanced in his email of 19 July. Both witnesses in effect said that that is what the first respondent did. And a reference to that email was a reference to the effect that he wanted to focus on his training and did not want the interruption of a disciplinary hearing

10 before he completed his training.

In the evidence there is nothing in Mr Mohamed's evidence to the effect that he said that on that day, that is the first respondent, he would be in Johannesburg.

In those circumstances, it would seem that the Commissioner completely misconstrued the evidence of the two witnesses. And this led to the finding that he made that the first respondent had lied to Mr Mohamed.

In those circumstances, it seems to me that the finding made by the court *a quo* that the award issued by the Commissioner was not justifiable, was fully justified.

20 Indeed, I am of the opinion that, when one has regard to the totality of the evidence that was given in the arbitration, and if the Commissioner had properly understood that evidence, the Commissioner would not have reached the conclusion that he reached.

I have no doubt in my mind that the finding that the Commissioner made is not a finding that a reasonable decision maker could have reached if he had applied his mind properly to the evidence that was led.

And in those circumstances, I am of the view that the appeal should fail and that the appellant should be ordered to pay costs.

Zondo JP

I agree:

Davis JA

10 I agree:

Jappie JA

That is the order of the Court:

Zondo JP.

Date of Judgment: 25-02-2009