



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA12/2015

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED

Appellant

(AMANDELBULT SECTION)

(Applicant in the Court *a quo*)

and

NUM o.b.o. MONAGENG & OTHERS

First Respondent

(First Respondents in the Court *a quo*)

COMMISSION FOR CONCILATION,

MEDIATION AND ARBITRATION

Second Respondent

(Second Respondent in the Court *a quo*)

COMMISSIONER OSMAN N.O.

Third Respondent

(Third Respondent in the Court *a quo*)

Heard: 17 February 2016

Delivered: 26 May 2016

Summary: Review of arbitration award – review test restated – court *a quo* subjecting the reviewing of the award to an appeal standard thereby failing to apply the review test – arbitrator faced with two versions and made credibility findings against employee - arbitrator finding that employee's version unreliable and thus dismissal substantively fair – award falling within the ban of reasonableness – appeal upheld - court *a quo*'s judgment set aside.

Coram: Tlaetsi DJP, CJ Musi et Sutherland JJA

JUDGMENT

CJ MUSI JA

- [1] This is an appeal against the judgment of the Labour Court (Molahlehi J) wherein it set aside an award of the third respondent (the commissioner).

- [2] The first respondent (National Union of Mineworkers (NUM)) represented all the dismissed employees, in this matter, who were employed by the appellant. They were all charged and found guilty of purchasing false medical certificates which they tendered to the appellant as the reason for their absence from work. They were all found guilty and dismissed. They referred an unfair dismissal dispute to the second respondent. Conciliation failed and the dispute was referred to arbitration. The commissioner found that the employees' dismissals were fair. Dissatisfied with the commissioner's award, the first respondent launched a review application in the court *a quo*. The court *a quo* decided in its favour. The appellant successfully applied, in the court *a quo*, for leave to appeal to this Court.

- [3] Although many witnesses testified during the arbitration proceedings, the facts of this matter are relatively simple (five witnesses testified on behalf of the appellant, all the employees testified and they also called two witnesses).

- [4] Dr Ditsiele and his wife practiced in partnership in Saulspoort. Ms Deborah Tsheole and Grace worked for them as receptionists. Ms Tsheole issued fraudulent sick certificates to and in the names of the employees. The sick

certificates were either given to them personally or to their family members. The sick certificates were issued at no fixed fee. It depended on how much the receptionists were offered. Ms Tsheole randomly wrote diagnosis on the sick certificates. The sick certificates issued by Tsheole to each of the employees were presented to the appellant as the reason why they did not report for duty on the dates specified in the sick certificates.

- [5] The issue in dispute was whether the employees knew or ought to have known that the sick certificates issued by Tsheole were fraudulent. It is not necessary to deal with the testimony of all the witnesses. The germane evidence can be summarised as follows.
- [6] Tsheole testified that she and her colleague, Grace, wore the same uniforms. They were receptionists and they never examined or issued medication to any person to whom they issued a medical certificate. She confirmed that on 1 August 2003, she issued a certificate to Mr Segwe without examining him or giving him medication. When she was confronted by Dr Ditsiele about the scam, she admitted and apologised. She was dismissed because of her fraudulent conduct.
- [7] The employees, except Mr Ntoagae, testified that they obtained the medical certificates from Dr Ditsiele's surgery after an examination by a lady whom they believed to be a medical practitioner and who gave them medication and medical certificates. They all testified that they preferred Dr Ditsiele's surgery as opposed to the mine clinic which was free or the public hospital.
- [8] Mr Segwe testified that he visited the surgery on 1 August 2003. A lady took his particulars and examined him and another lady handed the medication and the medical certificate to him. He reacted badly to the tablets and went back to the surgery on 2 August 2003 where he was examined by Dr Motene. Dr Motene took the certificate and the medication. He was given other medication and a fresh medical certificate. He could not explain how he presented the initial certificate to his employer instead of the one issued by Dr Motene.

- [9] Dr Motene testified that on 2 August 2003, he saw Mr Segwe who had an allergic reaction to the medication that was issued to him on the previous day. Segwe had the medication that was issued to him and he replaced the medication. He could not remember whether he reviewed the medical certificate that was issued on 1 August 2003. On 11 August 2004, a year and 10 days later, he wrote the following letter:

'To whom it may concern

Re Mr FR Segwe

Subject: Query on medical certificate

Dear Sir/Madam

This comes to help elucidate on matters relating to medical certificates issued at this practice last year.

Specifically relating to the above-mentioned, he was seen at this practice on 1/8/2003 and 02/03 August 2003.

Unfortunately on 1/8/03, he was seen by rogue elements who were out to commit fraud and this fact was oblivious to the patient. He considered their intervention noble only to emerge now that there was unscrupulous behaviour.

He was therefore issued with a medical certificate and also medication to which he reacted adversely hence a repeat consultation on 2/8/2003 of which I saw him as I was a locum at this practice on that day ...'

- [10] Mr Ngobeni, who was a NUM's Shop Steward represented Segwe at his hearing and testified that during the conciliation process, Mr Segwe presented two packets of medication issued to him by the lady at the surgery and the letter written by Dr Motene. Segwe was reinstated because of that evidence.

The commissioner made the following findings with regard to the credibility of the witnesses:

'In assessing the evidence of Ms Tsheole I found her evidence to be consistent with her previous affidavits made to the investigator Mr Joubert

and also consistent with the apology letter that she wrote to doctor Ditsiele on pages 5 and 6 of bundle A.

I could find no compelling reasons why the applicant would, after having been caught out, admitting to her part in the scam, and losing her job as a result, still falsely implicate the applicants in this scam. Clearly no evidence was presented to suggest that Ms Tsheole stood to benefit in any way from falsely implicating the applicants.

The applicants, on the other hand, who each testified under oath failed to deal with a number of questions put to them under cross examination. The compelling factors in this regard are that neither of the applicants could produce a receipt for any of the relevant consultations. It is also apparent that while none of the applicants testified that they presented any symptoms of urinary tract infection (UTI), a large percentage of the medical certificates reflect this to be the nature of illness or injury. The applicants were also evasive when questioned as to why they did not choose the option of going to the mine clinic or the public hospital, which have been free of charge. It is also extremely convenient that most of the days that the applicants were booked off created extended weekends for them.

In order to discredit the evidence of Ms Tsheole, the applicants relied on the evidence of Mr Segwe. I found Mr Segwe to be very unreliable witness in that the evidence before me was that Mr Segwe had presented 2 packets of medication (allegedly given to him by one of the receptionists), at his conciliation hearing at the CCMA, which ultimately led to him being reinstated. However, when he testified, he indicated that when he went to the surgery to see Doctor Motene, the next day, they took the pills that he was given the previous day and replaced them with other pills. He further also testified that the medical certificate that was issued to him by one of the receptionists the previous day was also taken back the next day and he was issued with a new medical certificate. It is therefore not clear as to how Mr Segwe was able to present the medication that he had reacted adversely to much later at the conciliation and also to tender the medical certificate that was given to him by one of the receptionists to the company.

Mr Segwe could also not clearly identify which of the receptionist had examined him and which of them had issued him with medication.

While the evidence of Doctor Motene was tendered in support of the justification to reinstate Mr Segwe, Doctor Motene could not present any evidence which would justify a similar approach adopted, in respect of any of the other applicants.'

- [11] The court *a quo* found that the commissioner did not apply his mind properly to the facts before him. The court *a quo* made a plethora of factual findings contrary to the factual findings that the commissioner made in order to illustrate the point that the commissioner did not apply his mind properly to the facts. The court *a quo* reasoned that this was an irregularity. The court *a quo* set out the correct review standard in its judgment and concluded that the decision of the commissioner was unreasonable and therefore susceptible to review. In my view, the court *a quo* did not apply the review standard properly. It unfortunately subjected the arbitration award to an appeal standard. It embarked on a reconsideration of the facts instead of focussing on whether the decision of the commissioner is one which a reasonable decision-maker could reach.

In *Heroldt v Nedbank Limited*,¹ the review test was stated as follows:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(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 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.'²

It is well settled that the review standard, in cases such as this, is reasonableness. If the decision of the commissioner falls within the band of reasonable decisions that a commissioner could make, then, courts should

¹ 2013 (6) SA 224 (SCA).

² At para 25.

not interfere with the decision. The court must thus enquire whether the decision falls within a range of possible justifiable decisions that could be reached based on the facts before the decision-maker and the law. Courts will sometimes be tempted to interfere because they would have decided the issue differently. They should however show deference to the commissioner, because he/she has been entrusted by the legislature to arbitrate and decide labour disputes that are properly referred for arbitration. Deference however does not mean that the court should not properly enquire into the facts that make a decision reasonable or otherwise.

[12] In *Head of Department of Education v Mofokeng and Others*,³ this Court clarified the following:

'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct

³ [2015] 1 BLLR 50 (LAC).

of the arbitration and as a result failed to address the question raised for determination.⁴ [Footnotes omitted]

- [13] What is therefore required when dealing with gross irregularities is firstly to determine the materiality of the error or irregularity and secondly to determine whether that irregularity resulted in an unreasonable outcome.
- [14] The court *a quo* did not assess whether the decision of the commissioner is one that a reasonable decision-maker could reach. It re-evaluated all the evidence and findings of the commissioner and rendered a decision which it perceived to be correct. In the process, it misconstrued not only the nature of its inquiry but also the facts that were before the commissioner. I say so for the following reasons.

The court *a quo* stated that:

'In essence of (sic) Dr Motene's testimony corroborated the version that Mr Segwe attended the surgery on 1 August 2010 (sic), was issued with medication to which he reacted negatively and had to return to the surgery for that reason the following day 2 August 2010 (sic). The medication was issued by Tsheole. These facts which were critical in resolving the conflicting version of the parties was(sic) not challenged and therefore remained undisputed.'

- [15] There is no evidence whatsoever that the medication was issued by Ms Tsheole. Neither Segwe nor Tsheole testified that the medication was issued by Tsheole. The commissioner had regard to Segwe's testimony and he found (correctly so) that Segwe was an unreliable witness. The commissioner's finding cannot be faulted. Segwe could not explain how the medical certificate he gave to Dr Motene ended up with his employer as the only medical certificate that explained his absence from work on the dates stated therein. He could not also explain how the medication that Dr Motene took and substituted with correct medication came into his possession after his visit to Dr Motene on 2 August 2003 so that he and his representative could produce it during the conciliation proceedings. He expressly testified that he gave the

⁴ At para 33.

medical certificate to Dr Motene and that Dr Motene gave him another one. His testimony is recorded as follows:

Mr Commissioner: When you explained to him what treatment you had, did you show him the medical certificate that you were given

Mr Segwe: Yes, I had it on me

Mr Commissioner: Did you show it to him?

Mr Segwe: I gave it to him ...

Mr Commissioner: What did he say about the medical certificate?

Mr Segwe: He did not say anything

Mr Commissioner: Did he give it back to you

Mr Segwe: No

Mr Commissioner: He kept it

Mr Segwe: He gave me another one ...

Mr Commissioner: The one that you got on Friday, the medical certificate that you got on Friday from the lady?

Mr Segwe: It remained at the surgery

Mr Commissioner: With the doctor

Mr Segwe: Yes

Mr Commissioner: And he gave you a new one!

Mr Segwe: Yes"

[16] If anything, the commissioner was lenient towards the doctor because he did not make any credibility finding against him. The doctor and Segwe contradicted each other. The doctor testified that he did not issue a medical certificate to Segwe. What is most disturbing about the doctor's testimony is that he did not know what medication was given to Segwe. He therefore did

not make a note about the medication that caused the negative reaction. When Segwe told him that he was examined and given the medication the previous day at that same surgery, he did not investigate who treated and or gave Segwe the medication. A year later, he wrote a letter stating that Segwe was seen by rogue elements without having any factual basis for making this bald statement. He did not know who gave Segwe the medication. He did not even know whether there was a doctor on duty on 1 August 2003. He was totally indifferent and did not do what any rational and concerned doctor would have done.

- [17] Dr Motene testified that he was confident that the medication that Mr Segwe gave him was from that practice. When he was asked during cross-examination what the medication that Segwe gave him was, he answered as follows:

‘Not really, but I know the biggest culprit in general practice, is usually Bactrim.’

- [18] Although the commissioner did not reject Dr Motene’s evidence outright, it is clear that Dr Motene’s testimony was vague, improbable and unreliable. The implicit rejection of his evidence was justified on the evidence before the commissioner. The improbabilities in his testimony were exposed during cross-examination. His testimony did not go unchallenged as the court *a quo* found. The court *a quo* found the following:

‘It is important to note that Ms Tsheole could not explain how the doctor could have issued medication for a sick note issued by her. She only conceded that she did issue Mr Segwe with medication when it was put to her that Dr Motene would be called to testify about that fact.’

- [19] Ms Tsheole did not make such a concession. I trawled through the record and could not find such concession. The court *a quo* found that:

‘She (Ms Tsheole) initially stated that the applicants knew who she was and could therefore not have mistaken her for a doctor. However, during cross examination she became argumentative on this point and finally

stated that she would give an answer once she had seen the transcript of her previous testimony on the point.'

[20] This is unfortunately also incorrect. It was put to her that during the previous proceedings, Mr Segwe was presented to her and she said that she does not know him. She denied it. It was then put to her that the transcript of those proceedings would prove her wrong. She persisted with her version and after numerous attempts to get her to change her version; she said she would wait for the transcript. The relevant part of the record reads as follows:

'Mr Commissioner: You are saying to her that you put to her that Mr Segwe was brought before her to identify and she said she does not know him. Today she is saying she know from the location (sic).

Mr Maimane: Yes

Mr Commissioner: Fine. Would you like to respond to that M' am?

Ms Tsheole: I do not recall on the previous hearing whereby it was posed to me whether do I know Mr Segwe, yes or no ...

Mr Maimane: If the record shows that you were given the opportunity to look at Mr Segwe and then you were also given an opportunity to say if you know him and your response was no, you did not know him, that would be a difficulty ...

Ms Tsheole: I will wait for the record and hear what was the response to that.

Mr Maimane: No I am just saying should the record bear me out, will you then concede that your evidence today is a difficulty. You will have given two contradictory versions on a crucial issue.

Ms Tsheole: If he proves that therefore yes, it clearly do state that (inaudible) I did not give an true evidence, but what happened there, some of the things I cannot recall them.

Mr Maimane: So if the record bears me out what would be your explanation for this serious contradiction?

Ms Tsheole: I will respond to that when the time comes because now I responded to – because here I responded by saying I do recall being asked that question.

Mr Maimane: So you say you would rather have the record brought here to look at it and then question of the contradiction?

Ms Tsheole: Yes, that will be the time if I will see whether I have given the truth or not. For now I cannot recall.'

[21] This is hardly an argumentative witness. She testified about the issue and was confronted about the transcript by her cross-examiner. Her stance was quiet rational and cautious. Near the end of her evidence, the following is recorded:

'Mr Commissioner: Yes Mr Maimane, before you do that, from my recollection yesterday there was an issue of the transcript. I do not know if that has been canvassed.

Mr Maimane: It has been sorted out. We could not find any record which supports the questions I put to this witness.

Mr Commissioner: So the witness will not be expected to respond to those questions?

Mr Maimane: I withdraw that question for the record."

[22] I do not understand how a concession made in favour of a witness can be held against her. Ms Tsheole was totally vindicated by the transcript and her insistence was not in vain.

[23] The court *a quo* also found that Ms Tsheole testified that a receipt book for payment was never used. That too was incorrect, Ms Tsheole never testified about a receipt book.

The court *a quo* found that:

'It is apparent that the commissioner rejected the version of Mr Segwe on the basis of irrelevant considerations. The Commissioner failed to appreciate the purpose for the testimony of Segwe. The testimony was presented to show

that despite the denial by Tsheole, she in fact did in her scam issue medication to her victims.'

[24] The commissioner considered Mr Segwe's testimony and rejected it because he testified that he gave the medication to Dr Motene but the same medication, miraculously, was presented at the Commission for Conciliation, Mediation and Arbitration.

[25] It is clear that the court *a quo*'s credibility findings were wrong. The substratum for all its findings was wrong because it misunderstood the evidence.

[26] The commissioner was faced with two mutually destructive versions. He had regard to the totality of the evidence before him. He evaluated the merits and demerits of each version and thereafter decided that the version presented by the appellant is the most plausible. He therefore found that the appellant succeeded in discharging its *onus* of proving that the dismissal of the employees was substantially and procedurally fair. He justified his choice with sensible and rational reasons. This is a decision which a reasonable decision-maker could reach. In my view, the order of the court *a quo* ought to be set aside.

[27] There is no reason why the costs should not follow the result. The dictates of fairness and the law requires that it be so. The court *a quo* made a costs order against the appellant. That order must also be reversed.

[28] I accordingly make the following order:

(a) The appeal is upheld with costs.

(b) The order of the court *a quo* is set aside and replaced with the following:

The review application is dismissed with costs.

C J Musi JA

Tlaletsi DJP and Sutherland JA agreed with CJ Musi JA.

APPEARANCES:

FOR THE APPELLANT:

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Sandton

FOR THE FIRST RESPONDENTS:

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