IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA25/2017

In the matter between:

NKOMATI JOINT VENTURE **Appellant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First respondent**

NOKO NKGOENG N.O. **Second respondent**

NATIONAL UNION OF MINEWORKERS **Third respondent**

MASHAMBA KHARIDZHA **Fourth respondent**

Heard: 10 May 2018

Delivered: 17 May 2018

Summary: Employee dismissed for dishonesty in tampering with formula on spreadsheet which contained bonus payments. At arbitration found that his dismissal was substantively unfair and employee reinstated. Labour Court dismissed employer's review application on basis that the arbitration award was not unreasonable. On appeal found that employee's role was to check the veracity of the information in the spreadsheet. He either failed to check the veracity of this information concerning himself or deliberately tampered with it to advantage himself. In either event, his conduct was dismissible. Labour Court erred in its failure to find that the arbitration award was not reasonable

having regard to the nature of the enquiry and the material before the arbitrator. Appeal succeeds with no order as to costs. Order of Labour Court set aside and substituted. Dismissal of the employee found to have been substantively fair.

Coram: Waglay JP, Phatshoane ADJP and Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

[1] This appeal, with the leave of this Court, is against the judgment of the Labour Court (Baloyi AJ) in which an application for the review of the arbitration award of the second respondent (the arbitrator), made under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), was dismissed with no order as to costs.

[2] Mr Mashamba Kharidzha (the employee) was employed in November 2010 as a payroll supervisor by mining company, Nkomati Joint Venture (the appellant). He was dismissed for dishonesty after having been found to have tampered with the formula on a payroll spreadsheet for October and November 2012. Aggrieved with his dismissal, the third respondent, the National Union of Mineworkers (NUM), referred a dispute on behalf of the employee to the CCMA for determination. The arbitrator found that the dismissal of the employee was substantively unfair and ordered that he be reinstated retrospectively into the same or similar position, with five (5) months back pay.

[3] The evidence at arbitration was that the employee's responsibilities as payroll supervisor included checking the final payroll spreadsheet prepared for monthly bonus payments for around 800 employees, before sending the spreadsheet for approval to Mr Suhayl Packery, the appellant's financial services manager. Mr Packery was newly appointed into his role and, on receipt of the spreadsheet, decided to review the data carefully in respect of

the five employees in his department, including the employee, to satisfy himself that "*everything is above board*". He found that the calculation formula used in the bonus spreadsheet had been altered to the benefit of only the employee, who had not worked 22 shifts in October 2012 but only 21 shifts. A review of the September 2012 spreadsheet revealed that the formula had also been altered for that month, with the employee recorded as having worked 22 shifts, whereas he had only worked 17 shifts. In addition, a manual capturing error was uncovered in respect of a former employee, Mr Sipho Mzimba. Mr Packery referred only that error involving Mr Mzimba back to payroll administrator, Ms Ndlovu, for correction since it did not involve an alteration to the formula. The evidence was that up to six employees had access to the spreadsheet. However, the evidence of payroll administrator, Ms Sindisiwe Ndlovu, was uncontested that it was only the employee and Mr Packery who could access the password required to alter the formulas used in the encrypted final document. The formula used in the spreadsheet was automatic and should not have been tampered with. Had the irregularity not been discovered, the loss to the appellant would have been the amount of R1500.00 paid to the employee. Given that the employee was employed in a position of trust and that his role was to check the veracity of the information in the spreadsheet, he had either failed to check the veracity of this information concerning him or deliberately tampered with it to advantage himself. In either event, his conduct could lead to dismissal. His failure to do so was found to be dismissible.

[4] The employee's evidence was that having reviewed the spreadsheet, he gave it to Mr Packery. He then asked Mr Packery if he could assist him with the review of the document but claimed he was "chased" out of the office by Mr Packery who wanted to do the job alone. Once back in his own office, the employee stated that he again reviewed the spreadsheet. It was then that he realised there were mistakes in respect of his own bonus calculation. He returned to Mr Packery to inform him that his pay had been calculated incorrectly and that he would ask the payroll administrators to change this. According to the employee, although Mr Packery initially "*did not have any problem*" with this, it was later apparent that he did. The employee then

testified that he told Mr Packery that "*there is an error under my name"* and that "*we … still have to review it*".

[5] The arbitrator found the version of the employee to be more probable that he had reported the error to Mr Packery. He took the view that the spreadsheet could have been remitted back to the employee to correct it given that it was not only the employee who had access to the spreadsheet. The arbitrator found that the appellant had not proved that the employee had tampered with the spreadsheet and that his dismissal was therefore substantively unfair. Since the trust relationship was capable of being restored, reinstatement with five months' back pay was awarded.

[6] Dissatisfied with the arbitration award, the appellant sought its review by the Labour Court. The Court had regard to the evidence that six people had access to the spreadsheet password, with the result that the evidence before the arbitrator was found to have been insufficient to prove fault on the part of the employee. Since the arbitration award was reasonable, the review application was dismissed with no order as to costs.

<u>Submissions on appeal</u>

[7] On appeal, it was contended for the appellant that there was no plausible explanation provided as to why, since it was the employee's role to check the spreadsheet, the employee did not identify the problem as it pertained to him and ensure that it was corrected before sending it on to Mr Packery. Since the evidence was that the employee was the only person who stood to benefit from the formula change, the most reasonable inference to draw on the facts was that the employee knew of the formula change which was to his advantage, that he was culpable and that his dismissal for misconduct was therefore fair. Having regard to the evidence before the arbitrator, the award was therefore unreasonable and the Labour Court should properly have it set aside on review. For these reasons, it was submitted that the appeal should succeed with costs.

[8] The third and fourth respondents opposed the appeal on the basis that the uncontested evidence was that six people had access to the spreadsheet and

there was no evidence that the employee had tampered with the formula. Since the arbitration award fells within the bounds of reasonableness required, the decision of the Labour Court to dismiss the review application could not be faulted. Even if this Court were to draw an inference that the employee was, at most, negligent in not identifying the problem before sending the spreadsheet to Mr Packery, dismissal was inappropriate given that a different error involving Mr Mzimba had been referred back to Ms Ndlovu for correction. For these reasons, it was submitted that the appeal should fail.

Discussion

[9] A determination as to whether the decision reached by the arbitrator was one that falls into a band of decisions to which a reasonable decision-maker could come, requires that regard must be had to both the nature of the enquiry and the material placed before the arbitrator.[1] While the appellant dismissed the employee for dishonesty in tampering with the formula used on a spreadsheet to calculate bonus payments, the arbitrator took the view that the issue before him "*was not whether the* [employee] *had changed the formula or not. Rather it is whether or not he tampered with the spreadsheet*". In doing so, the arbitrator misconceived the issue before him for determination, which led him to ignore material evidence that the spreadsheet had been tampered with by way of a change to the formula and that only the employee and Mr Packery had access to the system to change the formula.

[10] It is a rule of logic, as was stated in *R v Blom*,[2] that, when reasoning by inference, the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. A court is required to select that inference which is the more plausible or natural one from those that present themselves.[3] The facts before the arbitrator proved that in his role as payroll supervisor, the employee was required to check the bonus payment spreadsheet for errors before sending it on to Mr Packery for

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (*Sidumo)* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at paras 14 and 110.
[2] 1939 AD 188 at 202-3.
[3] *AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A).

approval. Having reviewed the spreadsheet, the employee sent it to Mr Packery. He provided no explanation as to why he had failed to identify that the formula had been changed to his benefit alone, more so when only he and Mr Packery had access to the system to change the formula.

[11] Having regard to the proved facts, the more plausible and natural inference to be drawn is that the employee acted dishonestly by tampering with the formula on the spreadsheet for his own benefit. The finding of the arbitrator to the contrary was a decision that a reasonable decision-maker could not reach on the material before him and the Labour Court erred in finding differently.

[12] In the circumstances, the appeal must be upheld, with the order of the Labour Court substituted with a finding that the review application succeeds and that the dismissal of the employee was substantively fair. Having regard to considerations of law and fairness, I am not persuaded that an order of costs should be made in this matter, more so given that the employee and his union were successful both at arbitration and in their opposition to the review application before the Labour Court.

<u>Order</u>

[13] In the result, the following order is made:

1. The appeal succeeds with no order as to costs.

2. The order of the Labour Court is set aside and substituted as follows:

> ‘1. The review application succeeds with no order as to costs.
>
> 2. The arbitration award of the second respondent, issued by the first respondent, is reviewed and set aside; and replaced with the order that the dismissal of the fourth respondent, Mr Mashamba Kharidzha, was substantively fair.’

Savage AJA

Waglay JP and Phatshoane ADJP agree.

APPEARANCES:

FOR THE APPELLANT: Mr M van As

Instructed by Cliffe Dekker Hofmeyr Inc.

FOR THE THIRD AND FOURTH

RESPONDENTS: Mr M Z Makoti,

Instructed by Mothobi Attorneys