

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR173/08

In the matter between:

NATIONAL UNION OF MINE WORKERS

First Applicant

RONNY MASHABA

Second Applicant

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

First Respondent

SIMON MOHUBEDU RANTHO N.O.

Second Respondent

MODIKWA PLATINUM MINE

Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award dated 8 October 2007 made under case number LP3778/07 by the second respondent (the commissioner) after he had found that the second applicant's dismissal by the third respondent was substantively fair and dismissed his claim.

Background facts

2. The second applicant is a member of the National Union of Mine Workers (NUM), the first applicant. He was employed by Modikwa Platinum Mine, the third respondent on 4 July 2005 as an employee benefits assistant or pay roll officer. On 9 May 2007 he was charged with two acts of misconduct. The first charge was "the use of racial language in

that on the 18 April 2007, he used the words: 'I hate white people' to a fellow employee. The second charge was that he was negligent in that on 1 March 2007 he processed a shift adjustment for an employee while it was stated that he was not at work. He appeared at a disciplinary hearing and was found guilty of the first charge and was dismissed on 23 May 2007. His appeal was dismissed. He assisted by NUM referred an unfair dismissal dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and arbitration contending that his dismissal was substantively unfair. He in particular challenged the appropriateness of his dismissal as a sanction.

The arbitration proceedings

3. The third respondent called two witnesses on its behalf. The first witness was Elizabeth van der Schyff (van der Schyff). She is employed as an employee benefits assistant since 23 June 2003. On 18 April 2007 she was going through the absence without permission (AWOP) report and noticed that one of their senior employee was booked off as AWOP. The report showed that the second applicant had booked him off. She telephoned the second applicant and asked him why he had booked off one of her people as AWOP. He asked her who the person was and she told him that it was a Mr Oosthuizen (Oosthuizen). He replied to her as follows: "You know what, I hate white people. That is why I did it." She replied to him as follows: "Excuse me, so you are racist now" and ended the conversation. She and the second applicant worked in the same department but in separate sections. He was working at central and she at the plant. Oosthuizen was working in the plant. She did not know what had triggered the second applicant and did not give him a reason to say that to her. She had expected him to respond when she told

him that he was racist. She was offended because she is white. The third respondent's position towards racism is known to all the employees. The second applicant never apologised to her. She felt that she could no longer work with him because the trust relationship was broken. They did not share racist jokes before and no grievance was lodged against her for making racist remarks previously.

4. The third respondent's second witness was Adriaan Jacobus Vermaak (Vermaak). He testified that he presided over the disciplinary enquiry of the second applicant. He pleaded not guilty to the charge of making racist remarks. He acknowledged that he made those racist utterances, i.e. "I hate white people". The dismissal was the appropriate sanction. There is a disciplinary code in the mine. Previously the third respondent encountered a problem with racism until it came up with a policy against it.
5. The second applicant testified. He admitted that a conversation with van der Schyff took place on 18 April 2007. The conversation was about Oosthuizen whom he booked AWOP. She asked why he did that. He then made a joke by saying "He hates white people". After that he rectified the mistake about the AWOP. The following day van der Schyff asked him to help her with the pay slip and he assisted her. He was amazed to learn from the security that she had lodged a complaint against him. He usually joked with her and he never felt offended as a result. The error would have happened no matter whether one is white or black. They had a good relationship. She once said to him that she knew that black people were not capable and he did not lodge a complaint against her.

The arbitration award

6. The commissioner issued an award. He has set out the evidence that was led. He then said that it was common cause that the second applicant uttered the words: "I hate white people" to a white person. The second applicant's contention was that he was joking when he uttered the words. On the other hand, van der Schyff testified that after the second applicant had uttered the words he did not apologise to her. Under cross examination the second applicant testified that if a person was not accepting his joke he would apologise. He blamed van der Schyff for not telling him that she was offended by the utterances. The second applicant testified that he was amazed to learn from the security that she had lodged a complaint against him. In spite of the knowledge that van der Schyff had lodged a complaint against him with regard to the utterances that he made, he did not ask for forgiveness. The commissioner said that by then she was clearly offended by the words uttered which words he contended were uttered jokingly. In spite of that, he never bothered apologising not even during the disciplinary enquiry. The commissioner said that if this were not a sheer display of arrogance by the second applicant it is a display of sheer remorselessness. In the face of these accusations, whether real or unreal, the second applicant was under a duty to respond immediately and he never acted positively.
7. The commissioner said that the second applicant testified that he used to make jokes with the said witness. At one stage the witness made racist remarks and he never reported it. Therefore, he could not argue that the third respondent was not consistent in dealing with cases of racism because he never reported it. The incident was never brought to the attention of the third respondent. The third respondent was not aware of the incident and

it could not have been expected to deal with it. The commissioner said that the other contention was that the third respondent in imposing the sanction of dismissal, did not consider mitigating factors, for instance, the fact that he is the breadwinner. The second applicant raised this issue during cross examination. In this regard van der Schyff testified that the third respondent's position towards racism was known by all employees.

Vermaak testified that previously, the third respondent encountered a problem with racism until it came up with a policy against it. Vermaak's evidence corroborated the evidence of van der Schyff on the existence of a policy on racism.

8. The commissioner said that for the mere fact that both the forms and contents of the documents in the bundle were not disputed he would refer to them. According to the records of the third respondent employees were warned against engaging in racist acts. The employees were also told that they would be dismissed if found guilty of any racist related incidents. Moreover, according to the disciplinary code the sanction for racially abusive language is dismissal for a first offender.

9. The commissioner said that against this background, he found that the utterances that the second applicant made were careless and afterwards he showed no remorse by failing to apologise to van der Schyff and to the third respondent because in essence, this was an offence against the third respondent. In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and others* (2002) 23 ILJ 863 (LAC), the Labour Appeal Court upheld the dismissal of a supervisor for having made racist remarks. It could be seen that racism is viewed in a serious light. The commissioner found that dismissal was an appropriate sanction in the circumstances. The commissioner found that the dismissal of the second

applicant by the third respondent was substantively fair and dismissed his application with no order as to costs.

The grounds of review

10. The applicants contended that the commissioner committed misconducts and gross irregularities, and exceeded his powers in the following respects:
 - 10.1 He made mistakes as to, and misunderstood, the applicable legal principles, and failed to apply the applicable law.
 - 10.2 He made mistakes so gross that they could not have been made without some degree of misconduct.
 - 10.3 He failed to grant the second applicant an opportunity of presenting his case, which opportunity he extended to the third respondent.
 - 10.4 The commissioner denied the second applicant an opportunity to cross-examine the third respondent's witnesses on material points.
 - 10.5 The commissioner misinterpreted the issues before him.
 - 10.6 The commissioner failed to observe the principles of natural justice.
 - 10.7 The commissioner failed to motivate the conclusions he reached.
 - 10.8 The conduct of the commissioner as reflected above resulted in the second applicant not having his case fully and fairly determined.
 - 10.9 The commissioner acted contrary to public policy.
 - 10.10 His findings are not justifiable in the light of the evidence before him, and are irrational.
 - 10.11 The conclusion that commissioner reached is one which no reasonable commissioner would have reached.

- 10.12 He ignored relevant, and took into account irrelevant, evidence.
- 10.13 He misunderstood the evidence before.
- 10.14 The commissioner exceeded his powers.
- 10.15 The third respondent obtained the award in an improper manner.
- 10.16 The commissioner ignored the fact that the language which second applicant used did not in any way undermine the third respondent's authority.
- 10.17 He also ignored the fact that the statement was merely jocular, as second applicant testified.
- 10.18 He ignored the fact that, as is reflected in van der Schyff's statement, the second applicant did not say he hated, but that van der Schyff knew that he hated whites.
- 10.19 He ignored the fact that, in the context in which the words were used, they could not have a serious impact on van der Schyff.
- 10.20 He ignored the fact that second applicant did not say that he hated van der Schyff or whites, but that van der Schyff knew that he hated whites. Therefore, this was not a language used against van der Schyff, but to explain, the second applicant's conduct to van der Schyff.
- 10.21 He ignored the fact that the statement, being a joke to a colleague, would negatively impair labour relations.
- 10.22 He ignored the fact that the second applicant did not have a record of using abusive or racial language.
- 10.23 He ignored the fact that the words used were not racist.
- 10.24 He ignored the fact that the words were uttered once.
- 10.25 He ignored the second applicant's frame of mind, which was that he was joking to a colleague.

- 10.26 The commissioner failed to appreciate the nature of the objection he raised against the third respondent's officials, and regarded it as a threat to him.
- 10.27 The commissioner misunderstood the evidence, when he held that it was common cause that the second applicant uttered the words "I hate white people". The words uttered by the second applicant were "You know I hate white people".
- 10.28 He ignored the fact that van der Schyff never said that, as at the time the words were uttered, she did not know of the second applicant's attitude towards whites, as the uttered words suggested.
- 10.29 He ignored the fact that the words were not uttered against, but as an explanation of the failure to pay the employee to, van der Schyff.
- 10.30 He failed to appreciate the nature of the second applicant's defence that the words were uttered as a joke. This is reflected in the commissioner considering the irrelevant fact that, after the second applicant said to van der Schyff that the latter knew of his attitude to whites, the second applicant did not apologise to her.
- 10.31 His finding that van der Schyff was offended is not supported by the evidence led before him, and reflects his failure to apply his mind.
- 10.32 The commissioner misunderstood second applicant's evidence to the effect that he used to make jokes with van der Schyff similar to the one he made on the day in question in this matter. This is reflected in his finding that second applicant "cannot argue that the third respondent was not consistent in dealing with cases of racism because he never reported it". This demonstrates that the commissioner misunderstood second applicant's defence, and therefore did not decide his case.
- 10.33 The commissioner failed to investigate, and ignored the actual content of, the workplace rule against racism, and decided the case on speculation as to its

content.

- 10.34 He ignored the fact that the words uttered were not racially abusive language which he says should be sanctioned with dismissal, according to his understanding of the disciplinary code.
- 10.35 He did not find that the words used by second applicant were racially abusive, but that they were careless, and the second applicant did not apologise to van der Schyff or show remorse, yet he applied the sanction applicable to employees guilty of using racially abusive language. This demonstrates his failure to apply his mind to and misunderstanding of, the issues before him.
- 10.36 He misunderstood and failed to apply his mind to the *Crown Chickens* case referred to in his award.
- 10.37 He ignored the fact that the facts of his case were distinguishable from those in the *Crown Chickens* case.
- 10.38 He failed to determine the content of the third respondent's policy against racism, and simply assumed that he had contravened its provisions.
- 10.39 The commissioner, without confirming evidence, assumed that his statement constituted a racist act in terms of the third respondent's policy on racism.
- 10.40 He assumed, without supporting evidence, that in terms of the third respondent's disciplinary code, his statement constituted racially abusive language.
- 10.41 He assumed, without supporting evidence, that the third respondent's disciplinary code was peremptory as regards dismissal as a sanction for using a racial language.
- 10.42 He failed to apply his mind to, and to determine, the issue of whether dismissal was one of the fair sanction, and what the appropriate sentence should be.

10.43 He failed to take into account and apply the code of Good Conduct of Dismissal.

10.44. His finding that his conduct was an offence against the third respondent's constitute misconduct, gross irregularity, excess of powers, failure to apply his mind, misunderstanding of the issues before him and demonstrates that it could only have been arrived at as a result of misconduct, amongst others.

10.45 He ignored the fact that his statement was not directed against van der Schyff, or the third respondent, but was just a reference to what, according to the joke, van der Schyff knew.

10.46 He ignored the fact that van der Schyff did not, in response to his statement, say that she did not know that "I hate white people". This clearly would have been a logical response, if she was to be believed.

Analysis of the evidence and arguments raised

11. Commissioners are appointed to deal with dismissal disputes. They are in terms of section 138(7)(a) of the Labour Relations Act 66 of 1995 (the Act) required to issue awards with brief reasons. This is exactly what the commissioner did. Guidelines are given to commissioners about what factors they should take into account in deciding what an appropriate sanction is. Ultimately the key question to be asked is whether the decision made by the commissioner is one that a reasonable decision maker would have made. It is not the role of this court to second guess the decision made by the commissioner. It is trite that commissioners must decide whether dismissal as a sanction is fair in a particular case in accordance with his or her own sense of fairness. Ultimately the commissioner's sense of fairness is what must prevail and not the employer's view. A commissioner is obliged to independently consider the appropriateness of the sanction

without showing deference to the sanction imposed by the employer.

12. It is common cause that the second applicant uttered the words “I hate white people” and was dismissed for this. It is further common cause that the second applicant did not inform the third respondent’s van der Schyff that this was said in jest. Mr Makinta, who appeared for the second applicant conceded that van der Schyff’s evidence on this aspect was not fully contested. His version that it was said in jest was not put to her when she testified. It is further common cause that the second applicant did not complain to the third respondent about what van der Schyff had allegedly said to him some time ago.

13. The applicants have raised 46 grounds of review which are set out in paragraph 10 above. In *Comtech (Pty) Ltd v Mohony N.O. and Others* DA12/05, the LAC and in dealing with the factual grounds required by Rule 7A(2)(c) of the Labour Court Rules held at paragraph 15 as follows:

“[15] The difficulty with the appellant’s case in this regard relates to whether the founding affidavit contains the factual grounds required by Rule 7A(2)(c) of the Rules of the Labour Court. Rule 7A(2)(c) of the Rules of the Labour Court requires a party who applies for a review, such as the appellant in this matter, to deliver a notice of motion that must be supported by “an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside”. Rule 7A requires the notice of motion to call upon, in this case, the commissioner “to show cause why the decision or proceedings should not be reviewed and correct or set aside”.

[16] In my view, the contents of paragraph 15 of the founding affidavit relate to

conclusions of law. There is nothing either in paragraph 15 or anywhere else in the founding affidavit which sets out the factual grounds upon which the appellant sought to base its legal grounds of review. In paragraph 15 of the founding affidavit the deponent said that the commissioner erred in his award in that he “failed and/or neglected and/or refused to apply his mind to the evidence led at the arbitration proceedings” but did not motivate this bald allegation by reference either to the evidence or the award.

[17] *The deponent to the founding affidavit also said in paragraph 15 thereof that the commissioner “furthermore did not apply his mind to the relevant case law, applicable to the facts of the matter which was presented to him, and therefore exceeded his powers as commissioner in not applying the relevant statutory authorities to the applicable facts of the case.” He did not say what case law he was referring to the commissioner failed to apply nor did he specify the so-called “relevant statutory authorities” applicable to the case that he complained that the commissioner failed to apply. There is absolutely no factual basis advanced for these complaints.”*

14. What the LAC said in *Comtech supra* applies equally to this matter. I need to say from the onset that the grounds of review raised by the applicants are baseless and are not supported by the evidence led before the commissioner. Some grounds were manufactured without having regard to the evidence placed before the commissioner. A few examples would do. A ground is that the commissioner failed to grant the second applicant an opportunity to present his case, which opportunity he extended to the third respondent. The fact is that the second applicant was represented by a union official who

was afforded all the rights afforded to representatives at such hearings. The commissioner cannot be faulted if the second applicant's version was not put to witnesses or if their testimonies were not contested during cross examination. The second applicant was afforded an opportunity to cross-examine witnesses and this is born out by the transcript of the arbitration proceedings. It is unclear why it was contended that the commissioner failed to observe the principles of natural justice or that he acted contrary to public policy. It was contended that the commissioner ignored relevant evidence, misunderstood the evidence before him, ignored the fact that the statement was made in a jocular manner etc. The commissioner's award points to the contrary. The fact is that the second applicant did not tell van der Schyff that what he said was said in jest. There are many other examples that show that all of the issues raised by the applicants were considered by the commissioner.

15. The second applicant did not refer to what case law he was referring to when he said that the commissioner failed to apply nor did he motivate the bald allegations by reference to the evidence led at the arbitration hearing. As stated above the second applicant was obliged in law to set out the factual basis for the bald allegation that the commissioner failed to grant the second applicant an opportunity of presenting his case and/or denied him an opportunity to cross-examine the third respondent's witnesses on material issues.
16. The uncontroverted evidence is that the third respondent has a zero % tolerance against racism. There used to be racial incidences at the premises and the third respondent's policy about this was communicated to all its employees. The fact is that van der Schyff felt offended by the remarks made by the second applicant. She was not informed that

she had previously also uttered such racist statements in jest. Since the words: “I hate white people” are obviously a racist remark and constitute hate speech, the commissioner in finding the employee guilty of the charge, did not arrive at a decision which no reasonable decision-maker could or should have reached and therefore did not commit a reviewable irregularity.

17. The commissioner has given reasons why he believed that dismissal was an appropriate sanction in the circumstances. He referred to documents in the bundle that were not disputed. According to the records of the third respondent, employees were warned against engaging in racist acts. The employees were also told that they would be dismissed if found guilty of any racist related incidents. Moreover, according to the disciplinary code the sanction for racially abusive language is dismissal on the first offence. The commissioner said that against this background, he found that the utterances that the applicant made were careless and afterwards he showed no remorse by failing to apologise to van der Schyff and to the third respondent because, in essence, this was an offence against the third respondent. The commissioner referred to *Crown Chickens* and said that the LAC upheld the dismissal of a supervisor for having made racist remarks. Racism was viewed in a serious light. The commissioner in arriving at the decision that dismissal was an appropriate sanction in the circumstances, made a decision which a reasonable decision maker would have reached in the circumstances.
18. The application stands to be dismissed.
19. I do not believe that this is a matter where costs should follow the result.

20. In the circumstances I make the following order:

20.1 The application is dismissed.

20.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS : ATTORNEY M E S MAKINTA

FOR THIRD RESPONDENT : M J VAN AS INSTRUCTED BY CLIFFE
DEKKER HOFMEYER
INC

DATE OF JUDGMENT : 19 AUGUST 2009