



REPUBLIC OF SOUTH AFRICA

LABOUR OF SOUTH AFRICA COURT, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1718-12

In the matter between-

NUM OBO ISHMAEL VETSHE AND 1 ANOTHER

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER PATRICK PERCY MAKGOPELA

Second Respondent

RUSTENBURG PLATINUM MINE (PTY) LTD

Third Respondent

Heard: 17 October 2013

Delivered: 07 February 2014

Summary: Review application. Principles governing inconsistent application of discipline. Principles governing resolution of dispute of facts. Employee accused of nepotism making bear allegation that others had also done the same. Not enough information placed before the employer to prepare a response to the allegation. Commissioner not called upon to consider inconsistency where allegation not properly substantiated by evidence.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the second respondent (the Commissioner) under case number NWRB 299-12 and dated 1 June 2012. In terms of the arbitration award, the Commissioner found the dismissal of the individual applicants to have been substantively fair and accordingly dismissed their unfair dismissal claim.
- [2] The applicants filed an application for condonation for the late filing of their review application launched in terms of section 145 (1) of the LRA (Act No. 66 of 1995) as amended. The condonation for the late filing of both their review application and supplementary affidavit was granted at the commencement of the hearing.

Background facts

- [3] The two individual applicants are former employees of the third respondent who respectively at the time of their dismissal occupied the positions of human resources coordinators and human resource development assistant.
- [4] The first individual applicant, Mr Vetshe, the HR Coordinator was charged with the following:
- '1. Failing to comply with Company Policies, Procedures, Regulations and Practices- In that you failed to adhere to and manage the Cadet program due diligently in terms of recruitment, appointment and training of employees.
 2. Not acting in the best interests of the Company.

3. Failure to adhere to Mine Health and Safety Policies, Procedures, Regulations and Standard Practices- In that you had arranged and/or allowed new Employees to work underground without the proper training and therefore placed their lives and that of fellow employees in danger.
4. Nepotism- In that you either arranged and/or allowed a family member/s to be appointed on the Cadet program without declaring and/or reporting same to your Superiors.'

[5] The third applicant, Mr Davids, was charged with the following:

- '1 Actions against the best interests of the Company.
2. Failure to adhere to Mine Health and Safety Policies, Procedures, Regulations and Standard Practices"

[6] The charges against the applicants arose in the context where the third respondent and the first applicant (NUM) had concluded an agreement in terms of which a cadet program was developed to employ family members of those employees who had been medically boarded.

[7] In terms of the cadet program which commenced operation in January 2011, a list of people who met the necessary requirements was developed. Their qualification had to be vetted by the third respondent. The other requirement was that those who were accepted into the cadet program had to undergo training based at Klipfontein Development Centre (KDC). On completion of the training, the cadets were to be placed at various mines to do their practical training.

[8] The recruitment and the training process of the cadets was overseen by the task team consisting of NUM representative and Mr Vetshe. The responsibility of Mr Vetshe and NUM representative was to ensure that the principles of the cadet programme were adhered to, and that there was no deviation from the agreed principles of the programme.

[9] During February 2012, a list of cadets was screened for the purposes of determining whether they qualified for the programme. After the completion of

the screening, Mr Botha, the HR coordinator informed Mr Vetshe those who were not recommended for appointment and that they should not be allowed into the programme. The list of those who were not recommended for the appointment included Ms Lebogang Vetshe a relative of Mr Vetshe.

- [10] Ms Lebogang Vetshe was despite not being recommended, appointed into the cadet programme. In addition to the problem of the appointment of Ms Lebogang Vetshe, the third respondent discovered that some 12 people had been appointed and had commenced work underground without the required job training. Those cadets had undergone Operational Skills Development (OSD) for induction, but did not undergo the training at Klipfontein Development Centre (KDC) as was required of them.
- [11] Allowing the cadets to work underground without the necessary training posed a health and safety risk for the third respondent. Ms Lebogang Vetshe was amongst the 12 cadets.
- [12] The instruction that the 12 cadets should be sent to work underground was given to Mr Moholo by Mr Vetshe, who was in terms of the cadet programme responsible for allocating the newly appointed cadets to the different mines.
- [13] As indicated earlier, Mr Vetshe and Mr Davids were charged and dismissed arising in particular from the appointment of the 12 cadets and their deployment underground without prior training. Their appeal was unsuccessful and subsequent thereto they referred a dispute concerning the alleged unfair dismissal dispute to the first respondent.

The grounds for review

- [14] The applicants contended that the Commissioner's arbitration award is reviewable in terms of section 145 (2) (a) of the LRA for the following reasons:

'14.1 The Commissioner misconstrued the law relating to consistent application in that he failed to take in account that the Third respondent had acted inconsistently in charging the member Ishmael Vetshe for nepotism;

14.2 The second respondent committed a gross irregularity in that he failed to apply his mind to the material evidence before him and as a result the members were not given a fair hearing. I state that had the second respondent applied his mind to this material evidence he could have found that the third respondent inconsistently applied the rule and found dismissal to be unfair.'

[15] In the arbitration award, the Commissioner identified the issues which he had to determine in relation to Mr Vetshe as follows:

'57 For the 1st applicant Mr Ishmael Lungile Vetshe substantive issues are:

- a) Whether or not the Applicant contravened a rule or standard regulating conduct in, or of relevance to, the workplace in all charges?
- b) Whether or not dismissal was an appropriate sanction for the contravention of the rule or standard in 3 charges?
- c) Whether or not the rule or standard has been consistently applied by the Respondent regarding the charge of nepotism? The Applicant will not challenge the appropriateness of sanction for the contravention of the rule or standard of nepotism charge.'

[16] In relation to Mr Davids, the issues for determination were identified as follows:

'58. For the 2nd Applicant Mr. Moleko David Davids substantive issues are:

- a) whether or not the Applicant contravened a rule or standard regulating conduct in, or of relevance to, the workplace in all charges?
- b) Whether or not dismissal was an appropriate sanction for the contravention of the rule or standard in all charges?'

[17] In analysing the evidence and the facts before him, the Commissioner concludes that he was confronted with two conflicting versions. He resolved the conflict by resorting to what was stated in *Sasol Mining (Pty) Ltd V CCMA*

and Another,¹ where the Court in dealing with this issue had the following to say:

‘One of the commissioner’s prime functions was to ascertain the truth as to the conflicting versions before him. As I have noted, this much the commissioner appears to have appreciated. What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party’s version.’

[18] In applying the above test the Commissioner made the following finding:

‘64 I find that the evidence of Messrs Bester and Moholo had been credible as truly before me, Applicants could not rebut any charge that was levelled against them. The Applicants had on several occasions agreed to the essential aspects of the misconduct. Mr. Vetshe conceded that he did not check the cadets’ documents as he trusted the HR Assistant but misdirected himself that one of the supervisors told him that the cadets were unskilled. Mr. Davids also conceded that there were no other documents he checked prior approving the movement of cadets. I am of the view that the Respondent’s witness evidence was more plausible than that of the Applicants.

65 On the issue of nepotism Mr. Vetshe failed to rebut the charge. How can a senior person like Mr. Vetshe play to be ignorant that his family member was part of the cadets? After he became aware why he did not withdraw himself from the whole exercise. He came with the excuse that he reported the names of Mr. Mahokho’s family to Mr. Bester, but he failed to rebut that why at the whole list the authorised Ms. L.M. Vetshe’s engagement. Further on the cadets that were found underground he was the one who gave such instruction again with a

¹ (2011) 32 ILJ 723 (LC) at para 9.

lame excuse that he trusted his HR Assistant. I find that Mr. Vetshe was not a credible witness he only wanted to pursue a frivolous averment that he had done nothing wrong.'

[19] The Commissioner further found that the dismissal sanction was fair.

The test for review

[20] The basic test to apply in review application is whether the decision reached by the Commissioner is one that a reasonable decision-maker could not reach.² The authorities have repeatedly emphasised that this is a stringent test which excludes the determination of whether the arbitration award was wrong.³ In *NUM and Another v Samancor Ltd (Tubatse Ferrochrome and Another)*,⁴ the Court held that :

'... Even if the reviewing Court believes the award to be wrong there are limited grounds upon which it is entitled to interfere.'

[21] The reasonableness of the Commissioner's decision in the present matter has to be determined also in the context of the approach he adopted in dealing with the disputed facts which was placed before him during the arbitration proceedings.

[22] The approach adopted in the *Sasol* matter referred to above in dealing with the resolution of conflicting versions and relied on by the Commissioner is in line with the decision of the Supreme Court in *SFW Group Ltd and Another v Martel ET Cie and Another*,⁵ where the Court held that:

'...To come to a conclusion on the disputed issues a Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability, and (c) the probabilities...'

² *Sidumo and Another v Rustenburg Platinum Mines and Others* 2008 (2) SA 24 (CC) at paragraph 110.

³ See *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (JA2/2012 delivered 4 November 2013).

⁴ [2011] 11 BLLR 1041 (SCA) at para 5.

⁵ 2003 (1) SA 11 (SCA) at para 5.

- [23] The other issue raised in this review application concerns the allegation of the failure by the Commissioner to take into account the inconsistent application of discipline by the third respondent. The issue of inconsistency in the application of discipline was considered by the Labour Appeal Court in *Early Bird Farms (Pty) v Mlambo* where the Court held that:

‘Like cases should be treated alike...The respondent and Maziya were guilty of the same offence, the theft of the chicken pieces. *Prima facie*, they should have received the same penalty. I say *prima facie*, because an employer may be justified in differentiating between employees, guilty of the same offence on the basis of difference in personal circumstances (such as length of service and disciplinary record) or the merits (such as the roles played in the commission of the misconduct)...’⁶

- [24] In *Cape Town Council v Masitho and Others* at 1961 the Court held that:

‘...but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way. Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias.’

Evaluation

- [25] **Mr Vetshe’s case:** As indicated earlier, the main complaint by the applicants in relation to Mr Vetshe’s case is that the Commissioner committed gross irregularity in not taking into account the inconsistent application of discipline by the third respondent. In this respect, the applicants contend that Mr Mokaba, Mr Mahoko and Budumela who were also involved in nepotism in the same way as Mr Vetshe were not charged for the alleged misconduct.
- [26] The allegation of inconsistency is raised as an issue in dispute in the pre-arbitration minutes and thereafter during cross-examination of Mr Bester. The question to Mr Bester in that regard is put in the form of an inquiry as to why other employees were not charged with nepotism.

⁶ (2000) 21 ILJ 1957 (LAC) At 546G-I

- [27] The applicants needed to do more than just making an allegation about inconsistency and posing a question of clarity as to why others were not charged. This is because the concept of inconsistency is not a rule and therefore the applicants needed to have taken their allegation further than stating it in the pre-arbitration minutes and enquiring about it during cross-examination. In order to succeed, the applicant ought to have provided more information about the issue. In the circumstances of this case, the applicants ought to have substantiated their allegation. The information they provided for the first time appear in both the heads of argument and in the supplementary affidavit ought to have been placed before the Commissioner during the arbitration proceedings. In this respect, it is contended on behalf of Mr Vetshe that Mr Makaba recruited his wife into the cadetship programme although she did not meet the requirements for such appointment. In the absence of proper evidence relating to the allegation of inconsistency, the third respondent could not have been expected to lead evidence as to why Mr Makaba was not charged when he had also, as alleged, committed the same offence as that of Mr Vetshe.
- [28] As indicated above, the details of the allegations about the alleged inconsistency raised in both the supplementary affidavit and the heads of argument do not assist the case of Mr Vetshe because it was not placed before the Commissioner during the arbitration proceedings. The Commissioner cannot accordingly be criticised for not taking that into account. In any case, this Court can only take into account, in considering the review application, the evidence and those materials which were before the Commissioner during the arbitration proceedings.
- [29] As concerning the substance of the charge proffered against Mr Vetshe, the Commissioner found that he failed to rebut the charge. It is important to note that Mr Vetshe did not dispute that employees with no proper safety related training were deployed underground. The excuse he gave for this serious risk to safety was that he trusted HR Assistant. The Commissioner also found Mr Vetshe not to have been a credible witness. This means that he had failed to

contradict the version of the third respondent that the dismissal was for a valid and fair reason.

- [30] In my view, the finding on the failure to adhere to safety requirements is much more serious than even nepotism upon which the defence of inconsistency is based on. It follows that the outcome of the arbitration award would still be sustainable even if the conclusion on inconsistency was to be found to be incorrect. In other words, in allowing employees who were not properly trained to work underground, Mr Vetshe created an intolerable situation that not only exposed the affected employees to the risk of injury and death but also others who may not have even been aware of the risk.
- [31] **The case of Mr Davids:** It is apparent that the Commissioner was faced with two conflicting versions in as far as the case of Mr Davids was concerned.
- [32] The case of the third respondent as presented through the testimony of Mr Bester was that Mr Davids was responsible for checking the qualifications of the employees and signed off to ensure that employees were referred to the correct training unit. According to him, Mr Davids was responsible to make sure that training was in place and that the legal requirements of training had not expired. He also stated that training was so important that every time there was a serious incident at the work place the first point of reference in the investigation is whether those responsible or involved had received the proper training. It was according to him the responsibility of Mr Davids to make sure after receiving the employees' papers from the HR Assistance that the employees are sent to the correct training centre.
- [33] The case of Mr Davids was that he was only responsible for booking the training.
- [34] The Commissioner resolved the above conflicting versions by having regard to the contradictory evidence, the credibility of witnesses and the probabilities of the two versions. The Commissioner found that the witnesses of the third respondent were more credible than those of both Mr Vetshe and Mr Davids. He also took into account that Mr Davids conceded that there were no other documents he checked before approving the movement of the cadets.

[35] The conclusion reached by the Commissioner after considering the conflicting versions was that the version of the third respondent was more plausible than that of the applicants.

[36] In light of the above analysis, I find no basis to interfere with the Commissioner's arbitration award and accordingly the applicants' application stands to fail. It would however, in the circumstances of this case not be appropriate to allow the costs to follow the results.

Order

[37] In the premises the applicants' review application of the arbitration award made under case number NWRB 299-12 and dated 1 June 2012, is dismissed with no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

G Mothobi of Mothobi Attorneys

FOR THE THIRD RESPONDENT:

Mr J Mothibi of Norton Rose SA

LABOUR COURT