



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 995-09

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED

(RUSTENBURG SECTION)

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER M PHETLA N.O.

Second Respondent

MTSHONGO, PM

Third Respondent

Heard: 09 January 2014

Delivered: 08 July 2014

Summary:

JUDGMENT

NAIDOO, AJ

Introduction

- [1] This is an application to review and set aside the second respondent's award, delivered on 17 March 2009 under case number NW3967-07, wherein the third respondent (employee) was awarded 12 months' salary (R92 005-80) subsequent to a finding that his dismissal was both substantively and procedurally unfair.

Background facts

- [2] On 6 January 2006, the employee commenced working for the applicant and was, at the time of his dismissal, a training instructor at the Klipfontein Development Centre. His duties included screening prospective employees, developing and training new recruits and conducting refresher training courses for employees returning from leave.
- [3] On 27 March 2007, he was dismissed for charges relating to bribery and dishonesty, in particular it had been alleged that he accepted monies from prospective employees in exchange for providing them with certain certifications required to obtain employment, alternatively, placement with the applicant.
- [4] At arbitration, the applicant led five witnesses while the employee testified on his own behalf and called one witness. The second respondent arbitrator found the employee's dismissal both substantively and procedurally unfair and awarded him 12 months compensation.

Grounds of Review

- [5] The applicant has raised various grounds on review alleging the arbitrator committed misconduct in that he;
- 5.1 Unduly rejecting the evidence of one Zamkile Sinkinkile, who gave direct evidence that he paid the employee in return for the latter passing him on certain evaluations and assessments,
- 5.2 Unduly rejecting the affidavit of a one Z Mshipeni wherein Mshipeni alleged he paid the employee monies in return for a pass out ticket issued when a prospective employee successfully completes a knowledge based assessment.

- 5.3 Wrongfully found the testimony of both Brian Kidson and Peter Breedts, called by the applicant, were merely expressions of an opinion,
- 6.4 By relying on evidence of the employee which was never put to any of the applicant's witnesses,
- 5.5 By failing to find that on a balance of probabilities, the employee chose not to attend his disciplinary enquiry and
- 5.6 By failing to apply his mind when awarding the employee maximum compensation.

Evaluation – Sinkinkile's evidence

- [6] Sinkinkile, who at the time of the incident was a prospective employee, led direct evidence in regard to paying the employee R350-00 so as to pass him on certain elevations. The arbitrator's reasoning for rejecting Sinkinkile's testimony is recorded as;

'He [Sinkinkile] said that he made these allegations against the employer because he was told by the officials of the employer who investigated these allegations that if he did not tell the truth he would not get a job. He further said in evidence that he had then said 'something' in order to save his job'

On this basis, the arbitrator took the view that Sinkinkile's statement had been made under duress and hence rejected same.

- [7] To evaluate the arbitrator's reasoning, it becomes necessary to record the following exchange from the transcribed record from proceedings:

Interpreter: when we were at Paardekraal training centre we were asked to tell the truth and we did or I did disclose that I bought a certificate at Trans for R150 and also we were taken back for training.

App rep: Good. You were asked by Mr Masisa to tell the truth. If you do not tell the truth you will lose your job that is why you had to tell the truth, is that correct?

Interpreter: it is correct

App rep: so you had to say something in order to save your job. Is that correct?

Interpreter: Yes, the way you putting it. It is the way it was said or the way it is.

App rep: My apologies, my apology, the reason why you falsely made an allegation to say you gave the applicant money and not tell the truth that you went through the screening, you signed the papers because you wanted to save your job.

Interpreter: As I have already stated that I only knew about this thing of induction and screening when I arrived at Paardekraal that is why I completed the form.

App rep: Now answer my question. My question, in fact my statement to you is as follows. That the reason why you made false allegations against the applicant to say you gave him R350 is because you wanted to save your job. You did not want to go back to the Eastern Cape with an empty stomach.

Interpreter: it is not like that.'

- [8] What must be mentioned is the fact that, earlier in his testimony and before the above exchange, Sinkinkile had testified that he had previously paid another person R150 for a certificate in drilling.

What is clear from the above exchange is that Sinkinkile, on his own volition, did not say what the arbitrator alleged him to have said, the representative made such claims to which the witness agreed.

On this understanding, it is unclear why the arbitrator interpreted the word 'something' as a fabrication of events. There was nothing to suggest that when Sinkinkile agreed with the representative question, 'so you said something in order to save your job'; he was in fact agreeing to the conclusion that he fabricated his version to secure employment with the applicant. The representative seemingly sought to clarify the question by asking Sinkinkile directly whether he lied to secure employment, to which Sinkinkile denied this.

Furthermore, from a reading of Sinkinkile's entire testimony, it is clear that he gave direct and convincing evidence which stood firm under a lengthy cross examination. There was also nothing to suggest that Sinkinkile was placed under any duress when making his written statement. Being advised to tell the truth or face losing one's job, does not necessarily translate to duress, it could well in my view, provide incentive for telling the truth.

From Sinkinkile's testimony, there was nothing before the arbitrator to support his conclusions reached. In arriving at this irrational conclusion, the arbitrator blindly ignores the rest of Sinkinkile's evidence. I, therefore, must accept the arbitrator misdirected himself when evaluating Sinkinkile's testimony.

Mshipeni's evidence

[9] Mshipeni was not present at the arbitration but his statement taken under oath, was read out during proceedings. In his statement, Mshipeni describes the circumstances in which he paid the employee R150-00 for a pass out ticket. The arbitrator rejects the statement on the basis that the applicant had not made the necessary and required effort in securing Mshipeni as a witness.

[10] Section 3 of the Law of Evidence Amendment Act states;

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless:

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the Court, having regard to:
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;

- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party to which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the Court be taken into account.'

While I am alive to the principle that arbitrators are not bound by the stringent standards adopted in a court of law, I do not interpret this to mean that an arbitrator should disregard the enquiry set out in s 3(1)(c).

In *POPCRU obo G Maseko v The Department of Correctional Services and Others*,¹ the Labour Court held:

'While it may seem that there is a tension between the requirement that section 3 of the Evidence Act must be applied by arbitrators when deciding whether or not to admit hearsay evidence and precept that strict adherence to formal rules of evidence is not required in arbitration proceedings, it must be remembered that section 3(1)(c) requires the arbitrator to consider the nature of the proceedings when making a ruling on the admission of hearsay evidence.'

[11] I accept that as part of the aforementioned enquiry an arbitrator must ascertain the reason why the person, whom evidence is tendered on behalf, is not present to do so in person but this is just but one of the considerations an arbitrator must take into account when deciding whether to admit such evidence.

Section 3(1)(c) lists the various issues an arbitrator should have regard to when faced with hearsay evidence, the ultimate being whether it is in the interest of justice to admit the evidence or not.

¹ [2011] 2 BLLR 188 (LC) at para 44.

What is evident is that the arbitrator focused on a single issue to the exclusion of the remaining ones, and in so doing reduced the relevant enquiry to a single enquiry as opposed to the enquiry set out in s 3(1)(c). It cannot therefore be said that the arbitrator rejected Mshipeni's statement having regard to the appropriate issues.

- [12] As a further reason for rejecting Mshipeni's statement, the arbitrator found that because Breedt, who took Mshipeni's statement down, could not confirm whether Mshipeni's statement was taken down correctly, Breedt's credibility when testifying on the affidavit, was brought into question.

To contextualise these findings, at arbitration Breedt conceded that when he took down Mshipeni's statement, the latter spoke in his vernacular language which had been translated to him (Breedt) by another employee acting as an interpreter. Hence at arbitration Breedt conceded that he could not be sure what Mshipeni said was accurately translated.

In the absence of Breedt's understanding of the language Mshipeni spoke, it could not be expected of Breedt to confirm the accuracy of the translation. What the arbitrator should have focussed on was Breedt's testimony² wherein he stated that once he had finished taking down Mshipeni's statement, he read it back to Mshipeni, this was translated to Mshipeni and having accepted the content, the latter signed the statement as proof thereof.

Applicant's further witnesses

- [13] At arbitration, the applicant, amongst other, called Brian Kidson and Riaan Harding to testify on its behalf.

Kidson was the HRD Co-ordinator and a senior training officer,³ likewise Harding was also a senior training officer.⁴ Harding testified that as a part of his duties, he would ensure the training complied with specific mining qualification standards.

² At page 223 of record.

³ Page 200 of the constructed record.

⁴ Page 341 of the record.

It was common cause that both Sinkinkile and Mshipeni underwent a written assessment to evaluate whether they were conversant with the positions they applied for. It was further common cause that the employee assessed their respective written responses in deciding whether they should move on to the following stage of the assessment. Having done so, the employee was satisfied that they had sufficient knowledge to proceed to the next stage of the process and gave them their respective certificates and/or 'pass outs'.

Both Kidson and Harding testified that had they evaluated Sinkinkile's and Mshipeni's answers, they would have failed them. In turn, this would have meant that neither Sinkinkile nor Mshipeni would have been considered for employment.

Somewhat surprisingly the arbitrator, in evaluating these witnesses, held the following in his award:

'I further find the testimony of other witnesses as regards how the screening and the evaluation ought to have been done as being expressions of opinions and not take the matter further.'

Whilst I accept that an instructor exercises discretion when evaluating prospective employee's and further that Kidson and Harding gave their individual opinions, it is nevertheless clear that they gave a professional opinion. They were both senior training officers whose duties and position qualified them to give a professional opinion. The arbitrator was therefore obliged to consider their views. The concessions that they made under cross examination do not detract, in any material way, from the opinion they gave

Furthermore, the arbitrator gives no reason as to why he was dismissive over Kidson's and Harding's relevant opinions.

Reasonableness – substantive fairness

- [14] It is not axiomatic that the arbitrator's award stands to be set aside following the above irregularities and/or misconduct. What must be considered is whether, on a

conspectus of all the evidence before the arbitrator, his findings would be considered reasonable if one were to cure these irregularities.⁵

- [15] Had the arbitrator accept Sinkinkile's testimony we would have before him direct evidence that the employee was guilty of the charges he was dismissed for.

An arbitrator acting reasonably would have had regard to the relevant factors when deciding whether to admit Mshipeni's affidavit. In doing so, a reasonable arbitrator would have taken into account the nature of proceedings – arbitration is not a court of law and hence the rules of evidence are somewhat relaxed. Such an arbitrator would have also found that in principle, Mshipeni's statement was corroborated by the direct and independent testimony of Sinkinkile. A reasonable arbitrator would further take into account that there was direct evidence that Mshipeni pointed the employee out in a line up and that Mshipeni gave his statement before Breedt who testified to this effect at arbitration. In addition, a reasonable arbitrator would have found that the applicant did have an acceptable reason to why Mshipeni was not present to testify himself; Mshipeni was never employed by the applicant.

In consideration of the above, it would have been in the interest of fairness to have admitted Mshipeni's statement.

With regard to the pertinent portion of both Kidson's and Breedt's testimony, the arbitrator should have accepted the professional opinion of these witnesses and weighed this up against the employee's testimony.

- [16] In brief, had the arbitrator not committed the aforementioned irregularities, he would have had before him, the direct testimony of Sinkinkile, which was supported by Mshipeni's statement as well as the evidence of Kidson and Breedt which further support the version that the employee accepted bribes. Following this, he would, alternatively ought to have, concluded that the applicant had set out a *prima facie* case of dishonesty against the employee, (even if not much probative weight was

⁵ See *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC) at para 31

attached to Mshipeni's statement) and as a result thereof, the evidentiary burden shifted to the employee to exonerate himself.⁶

The employee failed to do so. He made mention in testimony that he would be calling others to corroborate relevant portions of his testimony, but thereafter chose not to.

In arriving at this conclusion, I must accept that the arbitrator's decision with regard to substantive fairness is not one which a reasonable decision-maker could have arrived at.

It therefore does not become necessary to address the further grounds on review raised by the applicant.

Procedure

- [17] In terms of procedural fairness, the issue before the arbitrator was whether the employee was given an opportunity to be heard. The applicant led evidence that the employee was present when his representative was advised the hearing would continue in the latter's absence but nevertheless chose to leave with his representative. The chairperson therefore continued the hearing in the absence of the employee.

The employee and his representative testified that the opportunity to be heard was not afforded to the employee. They both testified that the former was not present when the chairperson informed the representative that the hearing would continue and was, at the time, outside waiting to be called in when his hearing was to start. He therefore was not afforded any opportunity to be heard once the hearing started.

In his award, the arbitrator finds that there was a material contradiction between the applicant's own witnesses as to whether the employee was present when the chairperson advised the employee's representative that the hearing would continue in the latter's absence. The chairperson, Harding, said the employee was present while Geyer, the ER officer said that he could not remember if the employee was

⁶ See *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2455 (LAC) at para 34.

present at such time. On this basis, the arbitrator accepted the employee's version and found that the employee was not given an opportunity to be heard.

- [18] It is unclear on what basis the arbitrator found a material contradiction between the testimony of Harding and Geyer. The fact that Geyer could not recall whether the employee was present does not contradict Harding's testimony on this point.

Before addressing the issue of procedure further, it would be prudent to point out that this Court, having identified the issue in dispute (that being whether the employee was afforded an opportunity to be heard), is not bound by the arguments presented by the parties when making its determination over the issue. If the issue can be decided from a reading elsewhere on the transcribed record and which the parties have not referred to, it would be absurd to hold the view that this Court is prevented from making a determination on the issue in dispute without considering or referring to portions of the record neither party has raised.

In returning to the merits, the issue before me is whether the employee was given an opportunity to be heard before the decision to dismiss him was taken.

The answer clearly can be found from a reading of Geyer's, Harding's as well as the employee's own testimony.

Testimony, supported by documentary evidence, was led that subsequent to 9 March 2007, (the day the employee's hearing convened), the employee received two notices from the chairperson.

The first notice sent on 14 March 2007 requesting the employee to make written submissions, by no later than 15 March 2007, detailing why he should not be found guilty of the charges put to him. This notice further advised the employee that his hearing would continue on 16 March for the chairperson to deliver his decision as to whether the employee was found guilty of the charges. The employee failed to make such submissions and further failed to attend the enquiry.

The second notice, sent subsequent to 16 March 2007, advised the employee that he was found guilty of the charges and that he should make further written submissions as to why he should not be dismissed. The notice also advised the

employee that his sanction will be delivered on a certain date and that he should attend. Again, the employee failed to make such submissions or attend the enquiry.

The employee does not dispute receiving these notices and even goes so far to say that once he received them, he alerted his representative.

- [19] Following these invitations, one must conclude that the opportunity to be heard before a decision was taken had been given to the employee. At arbitration, the employee did not give any reason why he did not take up these opportunities.

In *Semenya and Others v Commission for Conciliation, Mediation and Arbitration and Others*,⁷ the Labour Appeal Court held that when a reasonable opportunity has been given to an employee to be heard and that employee unduly refuses to take such an opportunity, it cannot then be said the employee's dismissal was procedurally unfair.

In inviting the employee to make these submissions, can it be said the applicant discharged its obligation with regard to fair procedure?

In *Old Mutual Life Assurance Co SA Ltd v Gumbi*,⁸ the Supreme Court of Appeal held that an employer's obligation, with regard to procedural fairness, is limited to affording the employee an opportunity to be heard before any sanction is handed down. It can hardly be said that the applicant *in casu* did not afford this opportunity to the employee.

Therefore, the issue of whether the employee was given an opportunity to be heard does not turn on whether the arbitrator was correct in accepting the employee's version. Rather, the issue can solely be determined by reference to the unchallenged facts set out herein above and which the arbitrator makes no mention of.

- [20] Had the arbitrator applied the relevant legal principles to the evidence that was before him, he would not have come to the conclusion he did with regard to procedural fairness.

⁷ (2006) 27 ILJ 1627 (LAC) at para 30.

⁸ 2007 (5) SA 552 (SCA); (2007) 28 ILJ 1499 (SCA) at para 8.

- [22] The applicant does not ask this Court to substitute the findings of the arbitrator if it is found his award stands to be reviewed but rather that the matter be referred to the first respondent for a hearing *de novo*.
- [23] In taking into account the relevant considerations in awarding costs, I am of the view that under these circumstances, it would be in the interest of fairness that each party bear their own costs.

Order

[24] In the premises, the following order is made:

- 24.1 The second respondent's award under NW3967-07 is reviewed and set aside.
- 24.2 The matter is remitted to the first respondent to be heard by a commissioner other than the second respondent.
- 24.3 There is no order as to costs.

Naidoo, AJ

Acting Judge of the Labour Court

Appearances

For the Applicant: Advocate E Tolmay

For the Third Respondent: Advocate T Tshabalala

LABOUR COURT