



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG**

CASE NO: C 528/13

In the matter between:

**RHEINMETALL DENEL MUNITION
(PTY) LTD**

Applicant

And

**NATIONAL BARGAINING COUNCIL
FOR THE CHEMICAL INDUSTRY**

First Respondent

J LE F PIENAAR (N.O.)

Second Respondent

AKHILE NOMBANDE

Third Respondent

Heard: 20 May 2014

Delivered: 24 February 2015

Summary: (Review – dismissal – finding of dishonesty irrational – failure to appreciate seriousness of later misconduct not rational – failure to consider the fairness of the dismissal in the light of the code of good practice – failure to consider the nature of the post and the reason for the candidates appointment when deciding on the appropriate sanction resulting in irrational outcome).

JUDGMENT

LAGRANGE, J

Introduction

- [1] On 17 September 2012, third respondent, Ms A Nombande ('Nombande'), was appointed on a six-month probationary period as the personal assistant to the General Manager: Human Relations of the applicant, Ms N Nakedi ('Nakedi'). On 11 February 2013 she was dismissed for dishonesty, poor performance and absenteeism before the probationary period had expired.
- [2] The arbitrator who decided her unfair dismissal claim found that, even though she was guilty of failing to perform regular and lawful instructions and guilty of poor work performance, the sanction of dismissal was too severe and ordered her reinstatement retrospective to the date of her dismissal with backpay. In relation to a third charge of dishonesty, the arbitrator found Nombande not guilty. The applicant seeks to set aside the award on review.

The award

- [3] The charges against Nombande read:

"1. Dishonesty

1.1 The year end function was not properly organised, and when asked why you did not source proper assistance, you indicated that you had asked both Chrisna and Lee. This was later discovered to be not true.

2. Failure or refusal to perform a lawful and regular instructions relating to your job

2.1 You were tasked on or about the first week of December 2012, to close collection boxes at the reception area for the purpose of collecting cheque clothes and toys for charity, you failed to perform the task.

2.2 You were instructed to send communication to General Management in good time regarding year end function, you failed to do this in time.

3. Poor Work Performance

3.1 You were tasked to seek for charity organisation which could be RDM beneficiaries, you failed to perform the task within reasonable and expected time and you only started task on the last minute after you were reminded.

3.2 You failed to organise the year end function as expected on 14 December 2012, despite being instructed by your line manager to ensure all is organised be all before you leave on the 13 December 2012.

4. Poor Work Attendance

1.1 You arrived late for duty, and left early on the 08-01-2013 without any supervisory authority.

1.2. You failed to keep office hours a few occasions during the period 14 December 2012 to 8 January 2013.”

- [4] The disciplinary enquiry found Nombande not guilty of the complaint about her poor work attendance and the arbitrator noted that the applicant conceded that Nombande was not guilty of irregular attendance on the 18, 19 and 20 December 2012. The arbitrator noted that Nombande pleaded guilty to the charge of dishonesty at both the disciplinary and arbitration proceedings.
- [5] The arbitrator found that it was the arrangements concerning the year end function that precipitated the disciplinary action taken against Nombande. In the arbitrator's evaluation of the evidence, he was clearly of the view that Nakedi should have had a greater hand in the arrangements and should not have left it up to Nombande to manage at relatively short notice. In the course of doing 'damage control' after the event, Nakedi had asked Nombande why she had not sought additional assistance, in particular from two other staff members who were referred to in the arbitration only as 'Chrisna' and 'Leah'. Nombande said that she had done

so simply to keep the general manager, who was furious, quiet. Later it was discovered that she had lied about the request for assistance. The arbitrator found however that this lie did not entail a willingness to cheat, steal, lie or act fraudulently nor was there an intention to deceive on the part of Nombande. He felt that she had answered yes to the question put to her “under the most stressful circumstances in an effort to defuse the situation”. Accordingly, the arbitrator found her not guilty of the allegation of dishonesty despite her plea of guilty on this count.

- [6] In relation to the charge of being off duty without authority on 8 January 2013, the arbitrator found that Nombande was guilty of this charge. In the course of his analysis he related the factual circumstances which may be stated summarily. Nombande had told her superior that she was going to assist with registration at a creche in Macassar, which was a charitable project of the applicant. However instead of going to the creche, the applicant had been assisting her cousin, to whom she was guardian, to register for a post-matric course.
- [7] The arbitrator also decided that the two charges relating to sending out a communication related to general management concerning the year end function and failing to organise it as instructed before going on leave on 13 December 2012 amounted to the same thing. The arbitrator found Nombande guilty of failing to timeously advise general managers to arrange for staff to be given time off to attend the year end function.
- [8] On the charge of work performance relating to the identification of a suitable charity to secure the applicant's BBBE rating, the arbitrator found Nombande was not guilty of this charge because no deadline had been set for completion of the task and it had basically been completed by the end of December 2012. However, the arbitrator agreed that she was guilty of poor performance for failing to put out the charity boxes timeously despite being reminded by Nakedi to do it.
- [9] In deciding what an appropriate sanction would be, the arbitrator had regard to Nombande's status as a probationary employee and considered the matter in the light of item 8 of schedule 8 -Code of Good Practice:

Dismissal dealing with probation, which he cited in full. He then summarised the import of the guideline on probation thus:

“[40] the purpose of probation is to give the employer an opportunity to evaluate the employee’s performance before confirming the appointment (item 8 (1) (b), and in terms of guideline 8 (1) (j) any person making a decision about the fairness of the dismissal of an employee for work performance (including a decision at arbitration) or to accept reasons for dismissal that may be less compelling that would be the case in dismissals affected after the completion of a probationary period. These guidelines provide the opportunity to the employer not to be burdened to cry on a permanent basis, an employee who cannot does not provide satisfactory services. The applicant has been found guilty of poor work performance, and it has been shown that the applicant is capable of doing the work she has been employed to do, provided she gets the required support.”

[10] The arbitrator found that one of the persons involved in the year end function who had a vital role to perform in that regard had been withdrawn from the event at least with the knowledge of Nombande’s superior and without Nombande’s consent. This did not amount to giving her the required support she could have expected. Secondly, even though Nakedi had spoken to Nombande about her shortcomings, there was no meaningful evaluation instruction and training guidance or counselling as envisaged in item 8 (1) (e) nor was she invited to make representations as expected in terms of item 8 (1) (h) of the code.

[11] In relation to the claim of dishonesty, the arbitrator noted that in respect of the first incident he had found Nombande not guilty of the charge and she had not been charged with dishonesty in relation to her misleading explanation of her whereabouts on 8 January.

[12] The arbitrator concluded that the approach of the applicant had been to see if Nombande could ‘swim without sinking’ and had not given her any prior formal warning for her dismissal. Consequently, he found that the

sanction of dismissal was too harsh. In considering the appropriate relief, the arbitrator accepted that even though said she could work with Nakedi, Nakedi could not work with her, but that did not mean that Nombande could not have been placed in another position or some other administrative capacity. He therefore ordered her reinstatement but in the position of a permanent employee of the respondent in a post other than secretary to the General Manager: Human Resources.

Grounds of review

- [13] The applicant raises a number of grounds of review claiming in the main that the arbitrator's findings are unreasonable, particularly those relating to the charge of dishonesty and Nombande's need for training and guidance. The attack on the reasonableness of the arbitrator's decision is not merely an attack on his own reasoning, but also an attack on his failure to consider other material evidence in reaching his conclusion. Further, the applicant accuses the arbitrator of displaying bias against it in the course of intervening in the proceedings to advance Nombande's case. The grounds are set out in the applicant's founding affidavit and it is not necessary to iterate each one here.
- [14] It is apparent from the arbitrator's evaluation that he also found that no investigation was held to establish the reason for Nombande's unsatisfactory performance nor was she invited to make representations before being dismissed.

Evaluation

- [15] On the question of Nombande's need for training, although the arbitrator appeared to be aware of the evidence that she had "considerable experience in an administrative capacity and as PA, as well as arranging events such as mayoral functions, workshops farewell parties" and although she acknowledged the evidence of Nakedi that Nombande's prior "experience in the arrangement of functions was a factor which influenced her appointment as a secretary", she did not factor these considerations into her evaluation of the need for further training, instruction, guidance and counselling. Furthermore, there was ample evidence that

she was regularly told to improve her performance and that Nakedi was constantly having to remind her to do things and complained about her trying to do too many things at the same time. During the course of her evidence, Nakedi said:

“... Before the charges, I would even call her to my office to say, Akhile I like you. You presented something to me in the interview that I have never seen before. Can you please just improve on your performance because I do not want to lose you? I would continuously tell her that, you know what I like you. I want to keep you. Hence I think I was tolerating whole lot of things maybe that he should not have, but I was hoping that once she gets used to the organisation she was just a bit confused, because if you have been a PA before you do not need to be taught on how a PA should conduct them.” (sic)

Further, as the applicant’s representative pointed out in closing argument the specific tasks she had to perform as part of her duties as a PA were not complex in nature and hardly required specific training.

- [16] The arbitrator’s conclusions about Nombande’s dishonesty are baffling. Nombande lied about having approached the two other employees for help. Nakedi then chastised at least one of them for not responding to the call for help as a result of this misrepresentation. When Nombande was cross-examined about this, it was apparent that she did not see it as very serious because it did not involve theft or dishonesty of that kind. Even though the arbitrator’s own characterisation of dishonesty clearly embraced the conduct of Nombande, it seems that he also accepted her rationalisation of it as a trivial instance of dishonesty to such an extent that he found she had not been dishonest.
- [17] When Nombande was asked how the employer could be expected to trust her after the second incident involving the concealment of her activities on 8 January 2012, her somewhat enigmatic response was that it was something that she and Nakedi could “work through” and “resolve” even though she had conceded in an email to Nakedi that it would be difficult for Nakedi to trust her after she lied on that occasion. It should have been

obvious to the arbitrator from Nombande's own admission that lying to Nakedi had created an untenable situation. Nakedi had testified that as a result of not being able to trust Nombande she was doing more things herself. Nakedi further said that the PA position Nombande held was one that required someone who was reliable and honest.

- [18] It may be true that Nombande was not charged specifically with dishonesty in relation to the events of 8 January, but it was obviously relevant to whether or not Nombande had learnt anything from the previous occasion when she had lied, less than a month before. Nombande's deliberate concealment of what she was doing that day aggravated the seriousness of her unauthorised absence from work, which is something the arbitrator did not even consider.
- [19] Considering the impact, can it be said that the arbitrator's findings were ones that no reasonable arbitrator could have come to on the evidence before him? On the question of Nombande's guilt on the charge of dishonesty, there is no rational way of explaining the arbitrator's conclusion.
- [20] In considering the appropriate sanction, even on the charges which the arbitrator concluded Nombande was guilty of, the arbitrator appears not to have applied the guidelines for dealing with a probationer when considering the standard of what constitutes a sufficient reason for dismissal in the circumstances before him. While acknowledging the basis on which Nakedi said she employed Nombande, namely as someone with sufficient prior experience to organise functions and perform the required responsibilities, the arbitrator appears to have implicitly believed that the employer was expected to treat her as someone who was still in training.
- [21] It will often happen that a probationary appointment is made in a junior level post in which it is anticipated that a considerable degree of on-the-job training will be conducted during the probation period. This was clearly not the kind of post to which Nombande was appointed. Consequently, the arbitrator ought to have realised that when dealing with a person on probation in a responsible position like that of a PA, where the successful candidate claimed to have the necessary experience for doing the job, it is

not unreasonable for the employer to simply point out the perceived shortcomings of the probationer and to emphasise the importance of improving her performance if she wanted to be permanently appointed. His failure to appreciate this led him to arrive at an outcome that was not one a reasonable arbitrator could have come to.

[22] Quite apart from that, there was nothing to suggest that Nombande was asked to do tasks beyond the level of competence she professed to have. At the end of the day, the essence of the applicant's complaint was that Nakedi could not depend on Nombande as she ought to have been able to. In this respect, the arbitrator simply did not consider the specific attributes of the probationary appointment that was under consideration. Had he done so, he could not but have realised that this was not a situation involving the appointment of a novice or where the duties imposed were ones that required close supervision and guidance. Again, even if one leaves aside the arbitrator's unreasonable finding on the charge of dishonesty, the applicant's conduct on 8 January in attending to her own personal business when her superior was not at the office and misrepresenting her whereabouts to obscure the unauthorised nature of what she was doing is clearly conduct that would raise grave concerns if committed by a permanent PA, let alone someone on probation.

[23] At the hearing of the application, it was contended on behalf of Nombande that although the arbitrator "might notionally have taken the lie [about her whereabouts] into account when he considered the severity of the misconduct for the purposes of assessing the fairness of the dismissal, he was not obliged to do so". The contention was made that the arbitrator had simply chosen to deal holistically with the charges as part of an assessment that went to the "failure of Denel to properly train and mentor Nombande as part of her probation".

[24] The difficulty with this line of argument is that the kind of misconduct under consideration in relation to her unauthorised absence from work on 8 January 2013 was not the type of conduct that an employer might be expected to train or mentor an employee on in an effort to correct it during the probation period. It is not misconduct arising from a failure to

appreciate the workplace rules and practices of a particular workplace. Consequently, even if the arbitrator had not been unreasonable in finding that there was more than sufficient reason to end Nombande's probation and the arbitrator's failure to appreciate the serious nature of her misconduct on 8 January cannot be rationally justified.

[25] When the arbitrator's finding on the charge of dishonesty is corrected, as it must be, to a finding of guilty, there can be even less doubt that the sanction of dismissal was an appropriate one.

[26] In view of the findings above, it is not necessary to pronounce on the complaint of bias against the arbitrator, which is a complaint that might have required the matter to be referred for a fresh arbitration. As the record is sufficient to make a finding on the reasonableness of the award, it is not necessary to venture into that enquiry.

Order

[27] In light of the reasoning above, the arbitration award of the second respondent dated 20 June 2013 under case number WCCHM243-12/13 is reviewed and set aside.

[28] The arbitrator's effective finding that the third respondent's dismissal was unfair is substituted with a finding that her dismissal was fair.

[29] No order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: W Jacobs of Willem Jacobs & Associates

For the Third Respondent: M H Steyn instructed by Cheadle Thompson Inc.

LABOUR COURT