



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable
Case no. JS 1179/11

In the matter between:

CHARLES DINKWENYANA

First Applicant

NATIONAL UNION OF MINEWORKERS

Second Applicant

and

BOKONI PLATINUM MINE

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

FRANCIS MAAKE KGANYAGO N.O

Third Respondent

Heard: 23 May 2014

Delivered: 01 December 2015 (In chambers)

Judgment on application for leave to Appeal

Shai AJ

Introduction

- [1] On 22 October 2014 I issued a judgment in the following terms:
- a) “The application for review and setting aside of the Third Respondent’s award dated 19 March 2011 issued under the auspices of the First Respondent under case number **LP4695-10** is dismissed.
 - b) The First and Second Respondents are ordered to pay the costs of the application jointly and severally”
- [2] The Applicant has now applied for leave to appeal against the whole judgment.
- [3] The application is opposed by the First Respondent.

Grounds for application for leave to appeal.

- [4] The applicants raised the following grounds of appeal:
- “4. The Court erred in making the following findings, and the Applicant’s submissions follow each finding”.*
- [5] That the Applicant allocated marks in respect of a question when he had not recorded an answer.
- 5.1 *The arbitrator committed a defect as envisaged in section 145 of the LRA, and the Court erred in this regard, by ignoring the undisputed evidence by Moloto, the Respondent’s key witness, that he had provided the Applicant with an executive pad to write on during the interview, and that of the Applicant to the effect that he had written some of the answers on the pad, especially long answers which could not fit on the small space provided in the questionnaire, including the questionnaire of Makgere, and this was also argued during the hearing. The Court did not consider this, hence, it has given no reason for rejecting it.*
- 5.2 *The Court found that the Commissioner was correct in finding that it was common cause that the questionnaire had to be completed in full and all answers, comments and marks had to be recorded on the questionnaire, when there was no such evidence on record, hence, neither the commissioner nor Court referred to that specific evidence. The Applicant’s evidence that an answer to a question could be recorded on the questionnaire, or on the pad, remained undisputed.*

5.3 *In fact, although Moloto did not tell what the Applicant had to write on the pad, at least he corroborated the Applicant's version that some information had to be written on the pad. The Applicant's version that he was allowed to write, and in fact wrote, answers on the pad was never disputed.*

5.4 *Therefore, the commissioner's finding in this regard is incorrect, and the Court erred, another court might find.*

5.5 *Although the judgment referred to the questionnaire of Makgere as appearing on page 31 of the Bundle, it was clearly a typing error, as the correct page 311, and as stated above, the Applicant's undisputed version is that he recorded all answers, those which he did not record on the questionnaire, he recorded on the pad.*

[6] The Court found that, at page 312, the Applicant allowed 10 marks for each answered question which gives him a total of 130 scores and percentage wise he was allocated 75%.

6.1 The Court misunderstood seventy five percent (75) allocated as the percentage for 10 marks multiplied by three (3), whereas it was the total of the mark on page 311 and 312.

6.2 As long as the Respondent had led no evidence as to how much the total in the questionnaire had to be, no one can say a total of 130 marks could not be seventy five percent (75%). The court erred in speculating in this regard, and based its findings on an assumption that 130 can never be seventy five percent (75%), and therefore erred in this regard.

6.3 The court found that at page 313 appears the questionnaire for one Lucas Mogashwa. No answer is recorded on any of the questions. He was nevertheless given scores ranging from 10-20.

6.4 The Court clearly ignored the evidence with regard to the use of the pad, as explained by Moloto and the Applicant.

[7] At page 314, he was given scores of 2 marks for the three answered questions and given a percentage of 50%.

[8] Again, the court misunderstood the evidence. The fifty percent (50%) was not for the six (6) marks on page 314, but was the total of the marks on

pages 313 and 314. This implies that the total expected was twice the marks allocated, and there was no evidence to the contrary, which if it existed, the Respondent had to lead as it bore the onus of providing the fairness of the dismissal, and did not.

[9] The same applies to the court's reference to the seventy eight percent (78%) on page 317, which in fact relates to pages 317 to 318.

[10] The court found that there were many of this kind and all by the Applicant.

10.1. It is submitted there were no instances where the Applicant was proven to have acted contrary to the applicable workplace rules/standards. Hence the court did not specify them. Clearly, the court's view is based on the same errors referred to immediately above, another court might find.

[11] What is clear is that, the Commissioner understood the facts before him and applied his mind to them. What is further clear to me is that the Applicant knew the standard but did not follow the said standard.

11.1 On the evidence on record, the Applicant recorded the answers and submitted them to the Respondent. This was the only standard testified about, and he has complied therewith. There is nothing else about the standard, with the Applicant did not comply, hence, the Court has not referred to the specific provisions thereof, which have not been complied with.

[12] The court found that the Applicant was asked on several occasions to explain how he allocated, and could not.

12.1 In this regard, the court ignored the Applicant's evidence demonstrating that he did not know what a percentage is, let alone calculating, and this was argued during the hearing.

12.2 The Applicant also indicated their scoring was not percentage based, but experience.

12.3 The above clearly demonstrated that the Respondent entrusted the Applicant with work he was not qualified for and was not competent to do. Therefore, his failure to perform was not misconduct, but more of incompetence, and he was not dismissed for incompetence.

12.4 The commissioner failed to apply his mind to the answers given by the Applicant, which demonstrated incompetence and no misconduct, another court might find.

[13] The court found that, with regard to the issues of signature of the questionnaire, the instruction was that they prepare a questionnaire which was to be agreed between the Applicant and his supervisor, and take a pad for purpose of making notes and when a candidate was agreed upon, both members of the panel must sign it.

13.1 The court ignored the Applicant's evidence, and to an extent, that of Moloto, that there was no instruction that both must sign.

13.2 The court further ignored the evidence on record, including that of Moloto, to the effect that the panelists never agreed on any candidate as a successful one, and therefore, even according to Moloto's evidence that joint signature was only required when the panelists agreed on a successful candidate, there was no need for both panelists to sign, and therefore the fact that Skhonza did not sign the questionnaire is not proof of any misconduct on the Applicant's side.

[14] The court found that the Applicant had conceded that percentage determined appointability, and therefore both panelists had to sign.

14.1 In this regard, the court ignored the Respondent's evidence on the interview procedure, which clearly confirms that, despite what the Applicant might have said or conceded, percentages were not used for the purpose of appointing employees.

14.2 On the other hand, a proper analysis of the Applicant's evidence reveals that he did not know what a percentage is, and did not mean that percentages were used to appoint. The court erred in looking at his evidence piecemeal, instead of as a whole, another court might find.

14.3 As stated above, the court erred in concluding that the Commissioner was correct in his finding that the completed questionnaire with percentages must be signed for by panel members, when Moloto's evidence was that the requirement that both panelist should sign applied only when they agreed on a successful candidate, another court might find.

[15] The court found that the commissioner is correct in finding that the Applicant has not complied with the Respondent's interview procedures.

15.1 It is submitted that the court erred in this regard, as the evidence revealed that the Applicant had complied with all the interview requirements as testified to by Moloto and Duba, neither the commissioner nor the court has specified the specific provision of the procedure which the Applicant has allegedly not complied with, except the reference to both panelists signing, which was dealt with immediately above.

15.2 The court erred in using general terms in this regard in this judgment, making it impossible for the Applicant to deal with, another court might find.

[16] The court found that, the Applicant had worked in the HR Department for about eight (8) years and had conceded in evidence that one of his duties is recruitment, and he had volunteered to do the recruitment. Therefore, the court found that he knew how to conduct an interview.

16.1 The court made an unfounded assumption that, working in a human resource department entailed conducting interviews, despite the fact that, on the evidence on record, the Applicant's normal duties

excluded interviews, and he was only involved on the day because Moloto was unavailable.

16.2 There was no evidence that the Applicant was trained with regard to recruitment procedures, and therefore he has not shown to be competent, irrespective of whether or not he might have previously and occasionally involved in interviews, another court might find.

16.3 The court erred in assuming that, knowing the recruitment procedures entailed knowing all the do's and don'ts of, and experience in , interviews, when there is no evidence to that effect, another court might find.

16.4 The court misunderstood the evidence with regard to the Applicant's alleged volunteering to attend the interview as having forced to do the interviews, when the Applicant, in a good workplace spirit, appreciated Moloto's predicament, and wanted to help him when he asked to be help.

16.5 On the other hand, the court misunderstood the Applicant's conduct to mean that he created an impression that he knew all the procedures for recruitment, when the Applicant clearly testified that Moloto had told him that all he needed to do was to ask the questions on the interview, and record the answer, which he did, and which can in no way constitute misconduct.

[17] The court found that, Moloto had testified that he had counseled the Applicant previously for similar offence and he further testified that the Applicant knew about the recruitment process. Further that, this was not put to Mr Moloto when he testified hence the Commissioner could not have taken it into account.

17.1 On the evidence on record, the counseling happened on the 16th February 2010, and the misconduct alleged in this case had already happened on 11th February 2010. Therefore, the

counseling could not be taken as a previous incident of misconduct.

[18] In any case, there was no evidence that counseling was not for a misconduct relating to conducting interviews.

[19] On the evidence on record, there was no proof that the Applicant's conduct had or could have serious consequences for the Respondent, and therefore it was not a conduct an employee could be dismissed for, in terms of the Respondent's disciplinary code. Another court might find that this court ignored this crucial evidence.

[20] The court erred in finding that there is no evidence before the commissioner that the Applicant had written some of his answers on the pad, when there is such evidence. The same applies to his version that he was not aware that both panelists had to sign the questionnaire.

20.1 On the other hand, this evidence was pleaded and not disputed, and the court was bound to accept it, but failed to do so.

[21] The court found the Applicant had to ensure that Mr Mkhonza, his fellow panelist, co-signed the questionnaire wherever there was agreement on appointability of the candidate, and that therefore he was guilty. However, the court failed to consider the fact panelists never agreed on anyone's appointment, but the Applicant took information about all those candidates he interviewed to Moloto, as the person whose responsibility it was to do the interview, to take the process forward. Therefore, the court erred in finding that there was no fault with the Commissioner's finding in this regard.

[22] The court found that the commissioner was entitled to ignore personal circumstances if they had not been raised, when the law required him to act inquisitorially, and asked for the information. Therefore, the court erred in this regard.

- [23] The court failed to address the issue of the appropriateness of dismissal, as a sanction, when evidence on record revealed that, in terms of the Respondent's disciplinary code, a dismissal on the charge preferred against the Applicant would only be appropriate if he had previously been given a final written warning, the Applicant had not been given such a warning and it was not even the Respondent's case that he had such a warning".

The test applicable in application for leave to appeal

- [24] The test in the application for leave to appeal was stated as follows in the case of *Van der Merwe v Du Plessis*, (1999) 20 ILJ 1305 LC paragraph 4 at 1306:

'Leave to appeal is granted only if this Court is satisfied that another Court might reasonably reach a conclusion different from that appealed against.'

- [25] In *National Union of Metal Workers of SA v Jumbo Products CC 1996 (4) SA 735 SCA at 742 A-B* the Supreme Court of Appeal described the test as one based on whether there is a reasonable prospect that a court of Appeal may come to a different conclusion and held the trial judge to have been wrong.

- [26] Having read the submissions from both parties and the judgment herein, and having applied my mind thereon, and taking the principles outlined above into account, I am satisfied that another court may not reasonably come to a different conclusion than the one this court reached.

- [27] In the premise I make the following order:-

- a) The application for leave to appeal against the whole judgment is dismissed with costs.

Shai AJ

Judge of the Labour Court of South Africa

LABOUR COURT