



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

**Not Reportable
CASE NO: JR603/2015**

In the matter between:

**GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD
(GOEDGEVONDEN COLLIERY)**

Applicant

and

LETHOKGO ABRAM MALAPANE

First Respondent

**COMMISSIONER FOR CONCILATION MEDIATION AND
ARBITRATION (CCMA)**

Second Respondent

COMMISSIONER MAGAELE ALFRED MASHAGOANA NO

Third Respondent

Date of hearing: 07 December 2016

Date of Judgment: 05 January 2017

JUDGMENT

MALINDI AJ

Introduction

[1] This is a review application whereby Mr Lethokgo Abram Malapane (the Applicant seeks a review and setting aside of the arbitration award of the Third Respondent dated 10 February 2015 under case number MP9292/14, and substituting the award with an order of this court.

[2] Malapane had been charged with:

“Misrepresentation of information (train results) which resulted in –

1. Loss of revenue;
2. Company's (GGV) image being dented/brought into disrepute.”

[3] At the internal disciplinary enquiry Malapane was found guilty of the following:

1. He had not checked the sample results presented to him from his laboratory;
2. There were errors in the calculations regarding the samples which compromised the quality of the sample and the integrity of the sample sent to Richards Bay terminal; and
3. He was aware that certain information was misrepresented and condoned this.

[4] At the arbitration hearing the Applicant called Mrs Silindokuhle Sizo Sithole (Sithole) and Malapane testified on his behalf. The Commissioner found that the dismissal of Malapane had been procedurally fair but substantively unfair. The Applicant was ordered to pay the Applicant's compensation in the amount of R342 000.00 (three hundred and forty two thousand rand) calculated at the Applicant's nett pay of R57 000.00 (fifty seven thousand rand) for six months.

BACKGROUND

- [5] Malapane was employed by the Applicant since 24 December 2013 as a laboratory superintendent. He was dismissed on 17 October 2014.
- [6] Malapane occupied a senior position and had four supervisors reporting to him as well as approximately 26 other laboratory assistants or technicians under his supervision.
- [7] A large part of his functions were to ensure that the tests carried out on coal to be transported to the Richards Bay Coal Terminal (RBCT) laboratory are correct and accurate. Mrs Sithole relied on him for verification of these results before the coal was transported to the Richards Bay terminal coal.
- [8] As a result of 40 trains of coal being rejected by RBCT Malapane was charged as stated above. In his answering affidavit Malapane denies that he ever at any point in time furnished or misrepresented to the Applicant information regarding the grade of coal that was to be transported to RBCT or any other client.
- [9] The Applicant has a disciplinary policy and procedure. Poor work performance is defined as including but not limited to, not producing results according to the said standard, sloppiness, non-compliance with return dates, incomplete work, etc. Schedule 1 to the Code sets out the categories of offences according to their seriousness. Under "major transgressions" for which a guideline of dismissal is suggested are listed as falsification of records / forgery, dishonest practices (theft, fraud, forgery, bribery, etc) and any other serious deviation from company policy and standards.
- [10] Malapane has been charged with misrepresentation of information in that he had not checked the sample results presented to him from his laboratory and that the errors in the calculations regarding the samples compromised the quality of the sample results. It is alleged that he was aware that certain

information was misrepresented and condoned this. Ms Sithole's evidence was that between May and September 2014 a total of 40 trains were rejected by RBCT, calculated at 6,3,14,10 and 17 per month, respectively. The Applicant attacks the Award in respect of what the Commissioner states at paragraphs 24 to 27 of the Award which read as follows:

- "24 Besides our cautionary rule on evidence of a single witness. The respondent has failed to substantiate in evidence how the applicant misrepresented the information which led to 40 trains being sent back from Richards bay due to poor quality. Misrepresentation must have an element of intention to deceive the other party. Throughout the proceeding it was never the company's case that the applicant deliberately attempted to deceive the company with the intention to benefit.
25. Mrs Sithole was not a credible witness. I am saying this because she was selective in answering questions. While she alleged to have extensive knowledge in the field of laboratory but she refused to comment on the comparison of the equipment within the two laboratories. This is so despite the applicant's version that they are not the same. He repeated this evidence when he was giving his evidence and the version was not challenged.
26. However, even if I were to accept that the 40 trains returned from Richards Bay was due to the result from GGV where the applicant was based. Still this could not be a dismissible offence taking into account that the said laboratory in question was not accredited. Even the systems between the two laboratories were different in that Richards Bay was automated and inspected from time to time.
- 27 I find the applicant to be a credible witness who stuck to his version that after the termination of services of ALS construction the coal were transported via conveyer belt straight to the trains and sent to customers without being tested for quality. This version was not challenged. Again the company failed to challenge his version that the

uncovered coals would lose the moisture on the way to Richards Bay Laboratory.”

SUBMISSIONS

[11] The Applicant submits that the Commissioner committed a reviewable irregularity:

1. By taking into account evidence regarding the difference between the RBT and GGV laboratories which was never put to Sithole.
2. By failing to take judicial notice of the fact that the RBT laboratory is the industry standard used by the entire coal industry and externally audited.
3. By making a credibility finding against Sithole on the basis that she was allegedly selective in answering questions.
4. By taking into account and/or placing relevance on the fact that the GGV laboratory was not accredited. The Commissioner concluding that the fact that the GGV laboratory was not accredited on its own undermined the integrity of the results that came out of it.
5. By making the assertion/finding that “the systems between the two laboratories were different.”
6. By failing to take into account that it was common cause that the reports which Malapane forwarded to Sithole amounted to a misrepresentation because the information contained therein was incorrect as to the quality of the coal.

7. By placing relevance to Malapane's version that the quality of the coal could have been affected because it could have gotten wet when it was transported on the conveyor belt to be loaded on the trains when this version was not tested with Sithole.

[12] On the other hand the First Respondent submits that:

1. the question concerning the difference between the two laboratories was properly put to Sithole.
2. the Applicant had an opportunity to challenge Malapane's version during his cross examination even if the version was not put to Sithole.
3. credibility findings cannot easily be overturned as the trier of facts is the one best placed to make such a finding.
4. it is significant that the GGV laboratory is not accredited as opposed to the RBCT one which is.
5. Malapane's evidence that the two laboratories use different sampling methods was not challenged.
6. no evidence of misrepresentation was produced at the hearing.

ANALYSIS

[13] It is easy to dispose of the Commissioner's finding that GGV test results would be unreliable merely because the laboratory is not accredited. The issue is whether GGV, even if it is not accredited, produced results that are credible. There was no pleading or evidence by the Respondent that the GGV results are invalid. In fact, in his evidence, Malapane was challenging why the RBCT results were preferred over the results produced by him at GGV. The

Commissioner erred in this regard because the question was not about an accredited laboratory versus an unaccredited laboratory.

- [14] The Commissioner erred also in accepting Malapane's evidence that the two laboratories were different in that they used different methods. First, Malapane's version in this regard was not put to Sithole in cross examination. Secondly, while under cross examination by Malapane, Sithole had positively testified that both RBCT and GGV use the same method of sampling. This evidence was not challenged.
- [15] The Commissioner further erred by making a credibility finding against Sithole on the basis that she was selective in answering questions. Besides the fact that it is not stated in the Award which questions she chose not to answer and whether they would have elicited answers adverse to the Applicant's case, the record shows that Sithole answered questions fairly including questions where her representative had objected to on the basis that the questions were not relevant to her. It was not put to her during cross examination that this would be argued at the end of the matter nor was she given a chance to comment on any suggestion that she was evasive or refused to answer questions whose answers would be damaging to the Applicant's case. It is a requirement that a witness be confronted with what will be argued so that they have an opportunity to comment thereon.
- [16] The Commissioner committed an error by placing relevance to Malapane's version that the quality of the coal could have been affected because it could have got wet when it was transported on the conveyor belt to be loaded on the trains. This version was not put to Sithole and she could therefore not comment on it. The evidence was that GGV, like RBCT, used an automated method of sampling and that the sampling was happening automatically every 15 minutes. This case is not about the difference in the sampling tests (repeatability) done at the GGV laboratory, but is about the certified quality of coal at GGV not being confirmed at RBCT (reproducibility). In other words, the failures in the quality of the coal delivered to RBCT was not as a result of

discrepancies between the test samples at GGV but between the differences of quality between the certified qualities by GGV compared to the results at RBCT. I might add that there is no evidence as to whether, according to Malapane, the pre-getting wet or post getting wet samples were relied on for certifying the quality of the coal.

- [17] Having disposed of the above issues, in my view the Applicant's difficulty lies more in the finding at paragraph 24 of the Award that the Applicant failed to substantiate in evidence how Malapane misrepresented the information which led to 40 trains being sent back from RBCT due to quality falling below the specifications. The Commissioner held that misrepresentation must have an element of intention to deceive the other party. The Commissioner said that throughout the proceedings it was never the Applicant's case that Malapane deliberately deceived or attempted to deceive the Applicant.
- [18] The First Respondent defended the finding of the Commissioner in this regard and referred me to *Gilbey Distillers and Vintners (Pty) Ltd v Morris N.O.*¹ for the proposition that misrepresentation is not easily inferred, and that for an act to qualify as misrepresentation the presenter must know that the presentation is false and that must be proved.²
- [19] On the other hand the Applicant submitted that in disciplinary proceedings misconduct that an employee has been charged with must not be given or interpreted in the strict criminal offence context. I was urged to recognise the fact that these charges are drawn by Human Resources officials who are not necessarily trained in law and that charges must be interpreted in the context of labour law.
- [20] Asked why she had complained against Malapane, Sithole stated that as senior metallurgist she relies on the communication she gets or receives from Malapane's laboratory that the quality of the coal met the required

¹ 1990 (2) SA 217 (SE) at 226 A

² Ruto flower meals (Pty) Ltd v Moriates 1957 (3) ALLSA 28 (T)

specifications and that she can send it to the designated customers. Sithole went on to testify that in respect of the 40 trains that are a subject of this case results were reported to her indicating that the coal met the specifications for the designated customer. She felt that the Applicant was at risk as a result of “misrepresentation of information from the period of 1 May to 15 September.”

[21] Sithole was later asked by her representative whether the Applicant lost money on the basis of the misrepresented information. She confirmed this.

[22] Sithole testified at length about the processes that were put in place within the laboratory system regarding sampling, preparation and analysis in an endeavour to correct what was proving to be a deterioration in the standards for obtaining accurate samplings in the GGV laboratory. At a later stage the reproducibility was at 30%, which means that only 30% of the trains despatched to RBCT were found to meet the quality that had been declared by GGV. This was despite the fact that Malapane was regarded as an expert and skilled as a laboratory superintendent. Malapane stated that when recruited by the Applicant he considered himself the perfect person for the job. In response under cross examination Sithole testified as follows:

“No. The company did not charge you for causing 40 rejections, the company charged you for the misrepresentation of information from 1 May to 15 September. That is what the complaint and charge is.

It is based on misrepresentation of information where GGV laboratories said their quality is suitable for customer A. when it gets to customer A, it is not actually suitable for that customer, based on these results produced from the laboratory.”

[23] The question therefore turns on whether the charge of misrepresentation of information sufficiently defines the charge that Malapane is facing. The standard set by the Applicant was that GGV must meet a target of 70% of accuracy in the specifications. However, over the relevant period it could only achieve a 54% level and was at 30% in the latter part of their relevant period.

- [24] In the category of major transgressions for which a sanction of dismissal is stipulated, annexure 1 to the disciplinary code lists falsification of records/forgery, gross negligence, dishonest practices (theft, fraud, forgery, bribery, etc) and any other serious deviation from company policy and standards.
- [25] On the analysis of the evidence presented it is clear that Malapane had committed a serious deviation from the standard that has been set. The question remains therefore whether that constituted a misrepresentation of information upon which Sithole despatched the 40 trains which turned out to fail the specifications that Malapane had represented to her. In *Police and Prisons Civil Rights Union v Minister of Correctional Services and Others*³ the principle was stated that the charge sheet should contain factual information as to the nature of an allegation against the employee “sufficient for an employee to know the case he is expected to meet.”
- [26] In this case it is clear that sufficient information had been provided to Malapane and he was able to deal with every aspect of the allegation that he had provided incorrect or inaccurate information to Sithole which she relied on.
- [27] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*⁴ Van Niekerk J said:
- “[17] In summary, section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner’s decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and

³ [1999] 20 ILJ 2416 (LC) at 2425, par [33]

⁴ [2009] 11 BLLR 1128 (LC) at par 17

a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification."

[28] In this case the Commissioner misapplied a number of legal principles as stated above, especially in applying the criminal standard requirement that misrepresentation must have an element of intention to deceive the other party. In disciplinary proceedings in the labour law context, the employer is required to charge an employee with, and to provide evidence that there had been a deviation from a standard that has been communicated and is known to the employee. In my view, the misrepresentation of the nature complained about by the Applicant, is not one requiring an intention necessarily on the part of Malapane to have presented false or manipulated information to Sithole with the intention to mislead her. It is sufficient that the complaint is that over a period, and despite endeavours to correct the situation, he represented to Sithole that the 40 trains contained coal that met the specifications for the categories of quality that he communicated to Sithole. This information was found not to be correct when the RBCT rejected the trains on the basis that there was a significant disparity from the required specifications.

[29] In the circumstances, the award stands to be reviewed and set aside.

Order

I therefore make the following order.

1. The arbitration award of the Third Respondent dated 10 February 2015 under case number MP9292/14 is reviewed and set aside.

2. The matter is remitted to the Second Respondent, the Commission for Conciliation, Mediation and Arbitration, for arbitration before a Commissioner other than the Third Respondent.
3. There is no order as to costs.

G MALINDI

Acting Judge of the Labour Court

Appearances:

For Applicants: Mr D. Cithi of Mervyn Taback Inc
Tel: (011) 358-7700
Fax: 0867712628
e-mail: dc@tabacks.com

For Respondent: Me Sello Seepamore of Mohlaba & Moshwana Inc
Tel: (011) 262-0406/9 / 0735655500
Fax: (011) 262-0404
e-mail: sseepamore@mmlawine.co.za