



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case No.: JR1810/15

In the matter between:

PALABORA COPPER (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION ('CCMA')

First Respondent

JOSIAS SELLO MAAKE N.O.

Second Respondent

JAN STEPAHNUS FOURIE

Third Respondent

Heard: 21 July 2017

Delivered: 27 March 2018

JUDGMENT

MONI, AJ

- [1] This is a review application of an award by Josias Sello Maake (the Commissioner) dated 6 September 2015 in the third Respondent's (Mr Fourie) favour.

The Facts

- [2] The facts presented here are a high-level overview of the evidence read and they are as follows.
- [3] Mr Fourie worked as a Superintendent of the Vermiculite Operations (VO) Workshop at the applicant. He began his tenure with the applicant on 1 September 2004. At the time of his dismissal, on 17 October 2014, he had worked for the applicant for approximately 10 years, had a clean disciplinary record and earned R79 577.00 per month.
- [4] Mr Fourie was dismissed for 'deliberate abuse of company property'. As such, in or during July 2014, he requested a technician, Mr Louw, via Mr Burger (Mr Louw's supervisor) to modify his son's motorbike carrier. Mr Fourie, required this to be done once all work at the VO workshop had been completed. In other words, not to have the modification interfere with Mr Louw's daily tasks.
- [5] Mr Verheem (the Maintenance Electrician at the VO) brought Mr Fourie's transgression to the applicant's attention in September 2014, only. This was after Mr Fourie had caught him trying to remove wooden pallets from the applicant and instructed him to return same. Mr Verheem claimed to have a permission slip to remove the wooden pallets however same was neither produced at the time, during Mr Fourie's disciplinary enquiry nor at the Commission for Conciliation, Mediation and Arbitration (CCMA) during the arbitration proceedings.
- [6] Mr Louw, modified the motorbike carrier extensively. He requested piping/tubing and paint for it. This was, on a balance of probabilities, supplied by Mr Fourie, even though he could not prove it. I hold this view as more probable than having used VO workshop's equipment because the VO workshop does not keep 12 mm piping/tubing and does not utilise white paint.

- [7] The above, notwithstanding, is for the applicant to prove that the 12 mm tubing/piping and paint belonged to the applicant which they have not done. Further, it is for the applicant to prove the probability that Mr Fourie, deliberately abused company property.
- [8] The Commissioner found that the charge of deliberately abusing company property was wide enough to encapsulate incorporeal things such as company time. This is reasonable. Further, the Commissioner found that Mr Fourie's guilty plea did not fall within the purview of the charge and so he did not intend to plead guilty to the charge. This is reasonable.
- [9] The applicant failed to lead any evidence at the disciplinary enquiry to prove Mr Fourie's guilt on a balance of probability. This is according to the Commissioner, procedurally unfair.
- [10] The Commissioner held Mr Fourie's dismissal to be substantively unfair. Only Mr Verheem was led on this score and the Commissioner believed that the witness was not credible and reverted to a single witness rule when dealing with the witness.
- [11] Mr Fourie was retrospectively reinstated and was to assume his duties on or before 21 September 2015, his dismissal sanction was substituted with a final written warning and he was to receive back pay in the sum of R955 140 payable on or before 30 September 2015.

The Grounds for Review

- [12] The applicant contends that the award falls to be reviewed and set aside on the following grounds:
- 11.1 The Commissioner disregarded Mr Verheem's evidence and failed to assess the credibility of competing versions; and
- 11.2 The Commissioner misdirected himself in determining whether the sanction of dismissal was fair.

The Disciplinary Enquiry and Procedural Fairness

- [13] The applicant believes that it held a disciplinary enquiry, when it did not.
- [14] At the point when the chairperson, Mr Expect Ntsepe (the Mining Operations Manager), asked Mr Fourie to plead, Mr Fourie pleaded guilty to a lesser charge of 'doing private work without requesting permission'. Mr Fourie did not plead guilty to the actual charge. However, the chairperson believed that he had.
- [15] The chairperson did not catch the anomaly even though he requested a plea explanation of Mr Fourie to which Mr Fourie stated that he pleads guilty to 'neglect[ing] to obtain permission to do my private job from my manager' he did not realise that Mr Fourie pleads not guilty to the charge. The chairperson proceeded to evidence in aggravation and mitigation without allowing Mr Fourie an opportunity to hear the evidence against him and attempt to defend same.
- [16] The applicant, unwittingly, foregoes a fundamental principle in our Labour Law; the *audi altarem partem* rule. It is for this reason that I state that there was no hearing held.
- [17] Considering the above, the dismissal of Mr Fourie is procedurally unfair¹.

The Arbitration and Substantive Fairness

- [18] Mr Kenny Rambuda's, (Employer Relations Specialist for the applicant), greatest hurdle was not procedure (procedural unfairness was a foregone conclusion in this matter and should have been acceded to), it was the substantive fairness component of Mr Fourie's dismissal. As arbitrations are hearings *de novo*, the applicant had a second bite of the proverbial cherry which mitigated the applicant's risk of Mr Fourie being returned to his post, as opposed to being compensated only.

¹ This fact should have been acceded to, by the applicant, upfront at the arbitration. Whilst the chairperson's mistake could have been remedied at the internal appeal (it was not) it could not be remedied at Arbitration.

[19] All the applicant had to do was, firstly, block out all the superfluous 'white-noise' about what Mr Fourie was willing to plead guilty to; and, secondly, concentrate on proving that Mr Fourie was guilty of the charge as alleged on a balance of probabilities.

[20] For this, the applicant needed to prove the existence of the rule, the nature and importance of the rule breached; whether the employee had knowledge of the rule, whether the rule was consistently applied; and whether dismissal was an appropriate sanction².

[21] There are hurdles within this rubric and if the applicant had applied its mind to this case, its presentation would have been stronger, such as:

20.1 the nature and importance of the rule breached. There is an unwritten rule allowing employees the opportunity to do private work provided permission is obtained and granted. If employees obtain permission to do private work then it cannot be construed by the applicant that their property is being abused, deliberately. The unwritten rule seems to undermine the integrity of the written rule. In this court's mind, the applicant's property is being abused regardless.

20.2 Further, as evidenced during the arbitration, the rule is not consistently applied, and sanctions therefore differ. This is mentioned by the Commissioner in the award.

20.3 Also, the disciplinary action guidelines³ state that 'an enquiry will be conducted and action short of dismissal or dismissal is probable'. Whilst offence 14 is deliberate abuse of company property the 'likely' outcome is dismissal; it is not a foregone conclusion. It leaves the recommendation of dismissal entirely in the discretion of the chairperson and after the requisite evidence is heard. The requisite evidence was not heard.

² See: *Woolworths (Pty) Ltd / SACCAWU and Others* [2017] ZALAC 54.

³ At page 43 of the transcribed record.

- [22] The Commissioner found that the applicant did not break the rule. This, in the circumstances wherein only Mr Verheem was led, is not unreasonable.
- [23] As mentioned, the chairperson did not undertake what was required of him. Leading the chairperson at arbitration only muddled the waters with incoherency.
- [24] Further, when I read the initial statements made by the three witnesses, taken during the investigation by Mr Matsepe, the investigator, all of them differ in material respects. This was not considered by the chairperson nor introduced by the applicant when leading Mr Verheem.
- [25] Had the applicant led Mr Louw he would have ascertained whether the work done was a deliberate abuse of company property, such as deliberate abuse of tools and time, or not. It was Mr Louw who received permission from Mr Burger to do private work. Thus, Mr Louw had immunity from prosecution and therefore was free to testify. Instead Mr Verheem testified that Mr Louw was not dismissed for the part he played in Mr Fourie's purported misconduct. Mr Verheem is wrong.
- [26] Mr Verheem was led to prove the reasonable employer test on behalf of the applicant. This is a person who is very much Mr Fourie's junior. He was, *inter alia*, caught red handed by Mr Fourie, removing the applicant's property (in this Court's mind that is either unlawful possession or theft). This Court doubts that Mr Verheem had permission to remove the wooden pallets, otherwise, I see no reason why he proceeded to return them. This Court has already noted that at no stage did Mr Verheem present his permission slip, this causes the Court to suspect the veracity of the claim. No doubt the Commissioner suspected this too.
- [27] Further, the above incident stirred 'an emotion' in Mr Verheem to prove to Mr Fourie that he is not 'untouchable'. The Commissioner encapsulates this as vengeance or revenge. This Court does not see this presumption as unreasonable.

- [28] Mr Verheem, was not disciplined for his transgression. Mr Fourie believed the scolding he gave Mr Verheem to be sufficient under the circumstances. According to the code of conduct Mr Verheem was facing dismissal. Mr Verheem only came forward to teach Mr Fourie a lesson, albeit two months after the fact. When asked during the arbitration if he intended to report Mr Fourie's transgression he stated that 'but for Mr Fourie's handling of his attempt to remove the pallets, he would not have reported the transgression' or words to that effect.
- [29] For reasons only known to the applicant, it believes Mr Verheem's account as more cogent than the rest, when he was not. Also, it believes Mr Fourie should have led Mr Louw. This goes against the rules of the onus of proof.
- [30] Mr Burger contradicts Mr Verheem, he testifies that he does not know how long Mr Louw took in modifying the motorbike carrier. This is because whilst at work he does other things which take him away from Mr Louw. Mr Verheem states that it took Mr Louw 3 days to modify the motorbike carrier, however, Mr Verheem also did other things which took him away from Mr Louw. So how does Mr Verheem know? If it was because Mr Louw said so; then all the more reason for Mr Louw to testify on behalf of the applicant.
- [31] Further, Mr Verheem did not know that the workshop does not keep 12 mm pipes and does not have white paint. Mr Burger testified that he placed the pipes/tubing on the shelves for Mr Louw. So, when Mr Verheem sees Mr Louw taking the tubing/piping from the shelves, he assumes it was company property, when it is not. Thirdly, Mr Burger testified that he received a packet with white paint and a slip in it from Mr Fourie. Mr Burger gave the packet of white paint to Mr Louw for the motor bike carrier. The workshop does not keep white paint. Mr Verheem does not know this.
- [32] Lastly, Mr Verheem did not consider that the workshop operates at 97.5% productivity under Mr Fourie's guidance, thus Mr Louw only worked on the motorbike carrier when he had nothing further to do.

- [33] I am guided by the principles enunciated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Kie SA and Others*⁴ in resolving those disputed facts. In nailing the applicant's colours to Mr Verheem's mast the applicant must stand or fall on what he said which compared to, *inter alia*, Mr Burger and Mr Fourie is unreasonable, improbable and not credible. As such, it is uncorroborated by Mr Louw, Mr Verheem has no first-hand knowledge of the make-up of the carrier and whether it belongs to the applicant or Mr Fourie, he is clearly biased, his evidence was contradicted by Mr Burger and his demeanour was defensive. The Commissioner was correct in proceeding with Mr Verheem's evidence with caution. In so doing, and in not leading any other witnesses on the substantive element of the rubric, the applicant failed to prove on a balance of probabilities that Mr Fourie was guilty of the charge.
- [34] Mr Fourie, always stated that he made a mistake in not obtaining permission from the applicant. He maintained his innocence regarding the 'deliberate abuse of company's property'. The Commissioner did not believe that Mr Fourie broke the rule for which he was charged. Considering the evidence led, this conclusion is entirely reasonable. If the Commissioner believed that no rule was broken he need not continue with the reasonable employer rubric.

⁴ 2003 (1) SA 11 (SCA) at para 14I –15E Where it was held that: 'To conclude on the disputed issues a court makes findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when the court's credibility findings compel it in one direction and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors are equipoised probabilities prevail.'

- [35] However, in this regard, this Court does not understand the purpose of mentioning that the sanction of dismissal was harsh or that the dismissal should be substituted with a warning. In this regard, the Commissioner is wrong and has misdirected himself. It seems as if he had a momentary lapse of reason, this court saying this is not excusing the Commissioner's reasoning, as such if Mr Fourie is not guilty of the charge there is no reason for the Commissioner to canvass the severity of the sanction or substitute same. Does this somehow negate the award? This Court does not believe that it does.
- [36] Perhaps the Commissioner's misdirection comes from the applicant's Mr Rambuda, who plays a part in this dispute, as if he is unsatisfied with being just the representative. At the outset, the applicant delayed the hearing of the arbitration by bringing an in *limine* point, regarding the certificate of outcome, which wasted public time and resources. Further, he allowed red herrings to cloud the issues and believed that the Commissioner is interfering with his cross examination of Mr Fourie, when he was asked to desist from ventilating that which the Commissioner was not required to adjudicate. This is a debate that went on for quite a few pages. Mr Rambuda in an affidavit calls it misconduct on the part of the Commissioner, this Court believes it is intentional torpor on the part of Mr Rambuda. I hold this view because in a fit of unprovoked pique, Mr Rambuda ranted at how unintimidated he was by Mr Burger and how Mr Burger intimidates everyone at work. I believe that this was unnecessary conduct meant to detract from the weaknesses in the applicant's case, the execution thereof was in poor judgment and of no potency.
- [37] In the above regard, I am guided by *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd*⁵ wherein Commissioner's commit a misconduct should their impartiality be deliberate for one party or a conscious bias in favour of the successful party. In requesting Mr Rambuda to assist the Commissioner in getting a handle on the dispute before him, the Commissioner was rightfully intimating that Mr Rambuda was not on point. When

⁵ 2002 (4) SA 661 (SCA).

Mr Rambuda began to debate the points with the Commissioner, the Commissioner reiterated that the case is for Mr Rambuda to make and he must run the matter how he deems fit. It is most unfortunate that Mr Rambuda failed to heed the Commissioner's advice. The Commissioner did not misconduct himself.

[38] The only complaint this Court has about the Commissioner's award; is, how it is drafted. The award is not succinct or simple enough to follow during a first perusal and even a second perusal. This is disappointing. However, it does not make the Commissioner's finding incorrect or wrong. It is the Court's belief that had it been written in the correct way; the applicant would have more readily accepted the outcome.

[39] In taking all the circumstances into account, but for the finding that the sanction was too harsh and substituting same (this is a misdirection of fact and law), the Commissioner's conclusion - that Mr Fourie was substantively and procedurally unfairly dismissed – was not incorrect. This Court believes that the Commissioner's decision is not one that no other reasonable Commissioner could not reach.

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

Order

1. The review application regarding the substitution of the dismissal sanction for a final written warning valid for 6 months is upheld; and
2. The review application is dismissed with costs.

N Moni

Acting Judge of the Labour Court

Appearances

For the Applicant: Advocate G Fourie

Instructed by: Webber Wentzel

For the Respondent: Advocate R Venter

Instructed by: Thomas and Swanepoel Inc.

LABOUR COURT