



IN THE LABOUR COURT OF SOUTH AFRICA, POLOKWANE

Not Reportable

Case No: JR 1091/2011

In the matter between:

XSTRATA SOUTH AFRICA (PROPRIETARY)

LIMITED – THORNCLIFFE MINE

Applicant

and

NUM OBO MPHOFELO, V AND 1 OTHER

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

SIMON MOHUBEDU RANTHO N.O

Third Respondent

Heard: 14 October 2017

Delivered: 11 April 2018

Summary: The arbitration award of a commissioner who based his decision on the fairness of the respondents' dismissal on their charges and not on the reasons for their dismissal, leading the commissioner to reach an unreasonable decision may be reviewed and set aside.

JUDGMENT

LALLIE, J

- [1] The applicant employed the individual first respondents who will be referred to as the respondents in this judgment in the positions of human resources development facilitators. The respondents were both dismissed for misconduct in December 2010. The first respondent trade union (the NUM) challenged the fairness of their dismissal at the second respondent, the Commission for Conciliation Mediation and Arbitration (the CCMA) where the third respondent (the commissioner) issued an arbitration award in which he found the respondents' dismissal substantively unfair and ordered the applicant to reinstate them. In this application the applicant seeks an order reviewing and setting the award aside. The application is opposed by the first respondent.
- [2] The respondents were arraigned before a disciplinary enquiry on a charge of breaching the applicant's rules and for working in an unethical manner in that they went into the HRD filing room and checked other employees' personal files. They were found guilty of accessing personal information from persons' files contrary to written instruction. Discussing the information with their fellow workers was found unethical, unacceptable and that it constituted serious misconduct. They were dismissed. The commissioner found their dismissal substantively unfair. He based his decision on criminal procedure authority which requires the charge to disclose an offence and inform the accused of the case he or she has to meet. He stated that to comply with rules of fairness, sufficient information must be disclosed by the employer in the notification when an employee is charged, to assist an employee prepare a defence. The commissioner found that the charge provided that the offence took place on 13 September 2010, while evidence was led to the effect that the misconduct was committed on numerous occasions before that date. He found the respondents not guilty as charged because evidence that was led

on behalf of the applicant did not support the charge. The commissioner accepted the evidence of Mr Lavelle (Lavelle), the chairperson of the disciplinary enquiry that the complainant got to know of the misconduct on 13 September 2010, a date on which Mr Mphofelo (Mphofelo), one of the respondents, was not on duty. He rejected the rest of Lavelle's evidence on the basis that it was hearsay evidence. He recorded that Mr Dreyer (Dreyer) was consistent about the fact that the respondents disclosed the information to him. He found that no evidence was led proving an irreparable breakdown of the employment relationship and ordered that the respondents be reinstated.

- [3] The applicant submitted that the award has to be reviewed and set aside because the commissioner committed gross irregularities in the conduct of the arbitration proceedings in adopting an overly technical approach in interpreting the allegations of misconduct against the respondents, disregarded relevant evidence and reached a decision which a reasonable commissioner could not reach. The respondent denied that the applicant established valid grounds to have the award reviewed and set aside.
- [4] The test for review based on irregularities committed by a commissioner in the conduct of an arbitration is settled. It is whether the commissioner misconceived the enquiry he or she had to conduct or reached an unreasonable decision. The commissioner was enjoined by section 138 (1) of the Labour Relations Act¹ (the LRA) to conduct the arbitration fairly and to deal with the substantial merits of the dispute with minimum legal formalities. The applicant correctly relied on the authorities which provide that before taking the decision to dismiss an employee, an employer is required to afford an employee an opportunity to state a case. Employers are therefore not required to conduct disciplinary enquiries like criminal proceedings. The commissioner erred in relying on principles which regulate fairness in drafting charge sheets in criminal proceedings in reaching his decision that the applicant's dismissal was unfair. The authority the respondents sought to rely

¹ Act 66 of 1995 as amended.

on which tends to support the commissioner's approach has been superseded by the latest interpretation of the LRA on the issue.

- [5] It is common cause that the applicants were charged with breaching the rule which prohibited them from accessing information in other employees' personal files but were found guilty and dismissed for accessing and conveying that information to their colleague, Dreyer. Evidence tendered at arbitration proves that the respondents committed the misconduct which led to their dismissal. Dealing with the same principle the court expressed the following view in *Woolworths (Pty) Ltd v CCMA*².

'[32] Unlike in criminal proceedings where it is said that "the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient", the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant's disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained.

- [6] The totality of the evidence before the commissioner proves that notwithstanding the contents on the respondents' notices to attend their disciplinary enquiries, they were dismissed for accessing information from other employees' personal files and conveying it to Dreyer. They had an opportunity to state their case in respect of the misconduct which they were dismissed for. The commissioner had to determine whether the applicant's conduct of dismissing the respondents for committing that misconduct was fair. He did not. He limited his enquiry into the misconduct with which they were charged. The commissioner conducted the enquiry into the fairness of

² [2011] 10 BLLR 963 (LAC) para 32

the respondents' dismissal in the incorrect manner and as a result of the error he reached an unreasonable decision.

[7] The record contains sufficient information which a decision based on the provisions of section 145(4)(a) of the LRA can be reached. The totality of the evidence before the commissioner proves that the respondents were dismissed for breaching a valid rule of conduct. They were aware of the rule. The rule was consistently applied by the applicant and dismissal was appropriate for the breach. The fact that the respondents were dismissed for misconduct different from the one with which they were charged is of no moment because the nature of the misconduct they were accused of was made clear at their disciplinary enquiries. They were therefore not prejudiced by the difference because they were aware that they were committing misconduct which was punishable by dismissal when they accessed the information and conveyed it to Dreyer. They were afforded an opportunity to state their cases before the decision to dismiss them was taken.

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

Order

1. The arbitration award issued by the third respondent under case number LP 7518-10 is reviewed and set aside and substituted with the following:

1.1 The dismissal of Kgaugelo Vincent Mphofelo and Simon Gadifele Phaswane was substantively fair.

Z Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Frahm of Bell Dewar Inc

For the Respondent: Advocate Saloojee

Instructed by Moseamo Papola Incorporated

LABOUR COURT