IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No.: JR2545/15

In the matter between:

DE BEERS CONSOLIDATED MINES LIMITED

– VENETIA MINES **Applicant**

and

THE NATIONAL UNION OF MINE WORKERS **First Respondent**

EVODIA RATHIPA LANDELA **Second Respondent**

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Third Respondent**

COMMISSIONER KHUTOS ELIAS MPAI N.O **Fourth Respondent**

Heard: **21 July 2017**

Delivered: **15 May 2018**

JUDGMENT

MONI. AJ

[1] This is a review application of an arbitration award (CCMA case no.: LP4876-15) heard on 20 September 2015 and 15 November 2015, respectively, by the Fourth Respondent (the Commissioner). The award dated 26 November 2015 went against the applicant, De Beers Consolidated Mines Limited – Venetia Mines (the Applicant).

[2] The Commissioner found that the second respondent, Evodia Rathipa Landela (Landela), was substantively unfairly dismissed and awarded her retrospective reinstatement. It is noted at paragraph 75 of the arbitration award that Landela's dismissal is substantively fair. This is an obvious error, as such fair is read by this Court as unfair.

[3] Landela worked for the applicant since September 1996. At the time of her dismissal she was a Procurement Clerk, responsible for contract management and procurement of outside service providers. She was dismissed on 23 March 2015 for gross misconduct in that she contravened the applicant's code of business conduct and ethics by failing to declare and avoid a conflict of interest. In doing so, she did not perform her duties conscientiously, honestly and in the best interests of the applicant.

[4] As an aside, the charge also states that Landela acted in conflict of interest with the applicant's shareholders. This I find heavy handed as such one's duties and obligations as an employee are toward the company only.

[5] The facts of this matter are seen by this Court as follows. The applicant procured the services of Grace Security (the Contractor) to install an alarm system on one of their properties. The contractor subcontracted this job to Genesis Security (the Subcontractor). The applicant was purportedly not aware of this. The subcontractor purportedly invoiced the contractor R20 000 (Twenty Thousand Rand) or the amount was made up of a loan and an invoice. Nevertheless, the

contractor remitted payment to Landela instead of the subcontractor. Further, the remittance came from a clearing house and was named Marine Loans. Because of this Landela states that she did not recognize that the payment came from the contractor. The subcontractor was neither paid by the contractor, the applicant nor Landela; as a result, the subcontractor threatened to expose the applicant to the media.

[6] Landela's version is that two of the subcontractor's employees lived on her property. They paid rent, they are named by her as 'Lodgers'. They requested her assistance as they did not have bank accounts. In or during August 2014, Landela provided her bank account as a conduit for them to do business. she was unaware that the contractor had subcontracted the applicant's business to the subcontractor at a time when the money was deposited into her bank account. She acceded to her lodger's request, without asking sufficient questions, she increased her daily withdrawal limit and handed R15 000 (Fifteen Thousand Rand) to one of the subcontractor's employees, a man by the name of Sam. Further, Landela gave her bank card and pin number to Sam to allow him to withdraw the remaining R5000 (Five Thousand Rand) which he subsequently did. The employees remained living at Landela's property as such she declared her outside business interest to the applicant's Tender Board on 9 September 2014.

[7] The applicant's version is that Landela placed herself in conflict of interest to the applicant, which is in breach of their code of ethics. The subcontractor's owner, Takie Mudau was unaware that it had already been paid by the contractor, by Mr Safe Mabasa, for services rendered. It believed that the applicant had not paid the contractor and lodged a formal complaint with the applicant's head office. The applicant could not extricate Landela from the above.

[8] The applicant charged Landela and held a disciplinary enquiry on 23 January 2015 which recommended her dismissal.

[9] In his arbitration award, the Commissioner held that the applicant must prove that Landela's dismissal was fair and aligned to s 192(2) read with s 188 of the Labour Relations Act[1] (the LRA). Further, that the above sections must be read with items 2, 3 and 4 of Schedule 8 Code of Good Practice: Dismissal. He found that the witnesses' testimony for the applicant was corroborated but for the issue of whether Landela should have declared her receipt of the amount of R20 000 (Twenty Thousand Rand). According to the Commissioner, Nomsa Shabangu, Landela's manager, believed that the money deposited into Landela's account had nothing to do with the applicant and was a private transaction. Further, Andrew Fourie, the chairperson of the enquiry went beyond the charges by finding that Landela was dishonest and fraudulent as money was loaned on behalf of the contractor to the subcontractor to do work, but it never reached them. The Commissioner believed that Safe Mabasa from the contractor should have been called to corroborate Andrew Fourie's evidence. Further, that Landela was a sacrificial lamb as the dispute between the contractor and subcontractor had nothing to do with Landela or the applicant.

[10] The Commissioner in applying the reasonable employer test found that, in all probability, the applicant did not break the rule for which she was charged. Further, there was no business interest that the applicant was to have declared. The Commissioner retrospectively reinstated Landela.

[11] The applicant's grounds of review are as follows:

11.1 The Commissioner committed a material error in that he believed there was no evidence showing conflict of interest and failed to deduce that there was a clear conflict;

[1]Act 66 of 1995 as amended.

11.2 The Commissioner committed a reviewable irregularity in finding that the dispute between the contractor and subcontractor had nothing to do with Landela and/or the applicant. There was no nexus between the parties and the applicant to cause any reputational risk; and

11.3 The Commissioner was wrong to call Landela a sacrificial lamb.

[12] The record depicts the following:

12.1 It is common cause that once the contractor had paid Landela, no payment was made to the subcontractor;

12.2 It is common cause that the owner of the subcontractor threatened to go to the media, purportedly, because the applicant did not remit payment to the contractor;

12.3 Due to the subcontractor's complaint, their contract was terminated. Approximately, 27 people lost their jobs;

12.4 Eman Nel believed that the transaction was the impetus for the declaration and that after the transaction, Landela decided to declare her business interests.

12.5 According to Nomsa Shabangu, Landela did not appreciate her actions, albeit that she went through an induction. Landela did not disclose the facts of the transaction to the applicant because 'it' (the subcontractor's business) 'is not in the mine'. In other words, she did not know that the subcontractor held a nexus to the applicant via the contractor;

12.6 Nomsa Shabangu changes her original thought on Landela's dismissal stating that her non-disclosure pointed to a conflict of interest and the lack of transparency and for that reason the dismissal was fair. This change of statement went unexplained;

12.7 Andrew Fourie, the chairperson of the disciplinary enquiry believes that Landela was dishonest and committed fraud in that the money remained unpaid to the subcontractor;

12.8 In accordance with the applicant's code of conduct dishonesty is a dismissible offence;

12.9 Whilst the complainant stated that the trust relationship was not broken, the chairperson took a decision not to be informed by this;

12.10 Andrew Fourie struggled with understanding the charges as such there is no such sanction in the disciplinary code that covers same. Further, there is no such sanction in the code of ethics. In coming to a decision, Andrew Fourie likened Landela's gross misconduct to dishonesty which carries a sanction of dismissal;

12.11 Andrew Fourie fails to decide the matter on the charge as alleged. He does not judge Landela on the rule that she broke, although he understands conflict of interest as: 'Landela worked with people who were to tender for business with the applicant whilst she worked with the applicant'.

[13] An applicant in a review application stands and falls by its founding papers. It must show the Court where the factual and legal errors are and how they have caused an unreasonable result, only then the award is liable for review.

[14] At arbitration, the applicant should have, on a balance of probabilities satisfied the Commissioner regarding the 'reasonable employment test'. Was Landela guilty of the charge? The Commissioner finds that she is not. The charge is: failing to declare and avoid a conflict of interest. In doing so, there is a failure to perform duties conscientiously, honestly and in the best interests of the applicant.

The Commissioner's reasoning stems from the poor and unhelpful testimony of the applicant's witnesses. The witnesses fail to satisfy the Commissioner's enquiry into whether Landela broke a rule. Landela purportedly does not know that the subcontractor worked for the contractor (who worked for the applicant). Had she known she would have been able to make the requisite judgment call, regarding the transaction which, had she proceeded with it, would have been in conflict of interest with the applicant's business because she failed to declare it and omitted to avoid same.

[15] Further, it was for the applicant to show the potential or actual reputational risk caused by Landela's transaction. I can find nothing in the record that Landela was part of a syndicate or group to scam the subcontractor and contractor thereby causing reputational damage to the applicant. In dismissing Landela, was the applicant able to mitigate its risk? I do not believe so.

[16] Further, had Landela known where the purported loan was coming from, the applicant would have been successful on its charge, but the applicant failed to prove same on a balance of probabilities.

[17] The Commissioner believes that Landela is a sacrificial lamb. With respect to Landela, she is so far from it, she has pulled the proverbial wool over the Commissioner's eyes. She collaborated in a dodgy transaction with men whose surnames she knew not. In a capital venture that attracted income tax and purportedly no pecuniary benefit to her, which this Court finds hard to believe or perhaps this lamb is filled with the milk of human kindness that she would prejudice herself in this way? Further, Landela works in procurement, she knows how business should be done. At the time of her dismissal, Landela had worked for the applicant for well over 19 years without a blemish on her record. Her length of services aggravates against her. This is an employee who knows what a business transaction looks like and the information one needs to effect same. Yet, she obliviously transacts, in a manner that concerns this Court. When the

dodgy transaction is highlighted she does nothing to mitigate the subcontractor's risk because she has purportedly done nothing wrong. This thinking is irrational and frivolous. Let's examine this, considering the applicant's concerns around this transaction, the subcontractor was not paid. Landela was paid by the contractor. But she is not the subcontractor. She pays money to an individual who is not the subcontractor, either, whose surname she does not know and who does not have a bank account. She further gives him her bank card to withdraw the money that remains in her account. There is something sinister about this transaction but who needs to put their finger on it? Who needs to prove on a balance of probabilities that the dismissal of Landela is substantively fair? It is not for the Commissioner to do so.

[18] It is the primary responsibility of the applicant, as the employer, to prove on a balance of probabilities that what Landela did was wrong and she can no longer be trusted to conduct herself without fear or favour in her procurement position. The applicant cannot expect the Commissioner to do so.

[19] the applicant is in the invidious position as such the Commissioner believes the above type of employee should be placed back into a position of trust. Had the applicant proved the charge, then the Commissioner would have had to hear evidence on factors that mitigated for upholding the dismissal such as dishonesty and any losses. I remind the reader that Andrew Fourie could not cogently explain why he believed Landela to be dishonest and fraudulent or guilty of the alleged charge.

[20] At arbitration, which is a hearing *de novo*, the applicant provided little evidence to prove, *inter alia*, the breach of the rule. The conclusion provided, by the Commissioner, is rationally connected to the reasons given based on the material available to him and is therefore under the circumstances reasonable[2]

[2] See: *Edcon Ltd v Pillemer NO & others* [2010] 1 BLLR 1 (SCA) para 23.

but for the sacrificial lamb comment. Is the comment sufficient to overturn the Commissioner's Award? I do not believe so.

[21] When Eman Nel testifies he excruciatingly explains why Landela should have declared her interest in the transaction. Had she done so then there would possibly have been no conflict of interest or rather the tender board would have decided on the conflict. This compliance approach is complicit in allowing the Commissioner to believe that what Landela did was not serious, a mere tick and cross scenario would have sufficed. The Commissioner retrospectively reinstates Landela due to the way the applicant ran its case. Eman Nel's testimony in this regard makes little sense especially when the charge is acting in conflict of interest and not failure to declare one's interest.

[22] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] the Court held that ultimately, the Commissioner's sense of fairness is what must prevail and not the employer's view.

[23] There are no sufficient reasons to overturn the Commissioner's arbitration award, same is upheld.

<u>Order</u>

1. The review application is dismissed.
2. There is no order as to costs.

Natasha Moni

Acting Judge of the Labour Court of South Africa

[3] [2007] 12 BLLR 1097 (CC).

Appearances

For the Applicant	: Mr D Cithi of Mervy Taback Inc.
For the First Respondent	: Adv Makoti
Instructed by	: Mothobi Attorneys