



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR2428/16

In the matter between:

**ANGLO AMERICAN PLATINUM
AMANDELBUT COMPLEX (PTY) LTD**

Applicant

and

ERNEST POOE

First Respondent

MOLOKO EPHRAIM PHOOKO N.O.

Second Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 22 August 2018

Delivered: 07 September 2018

Summary: Review application – unmeritorious points *in limine* – the purpose of a charge sheet is to inform the employee of what the allegation(s) against him/her are – to convict an employee on a different allegation proven during the enquiry constitutes a mistrial.

JUDGMENT

NKUTHA- NKONTWANA. JIntroduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA). The applicant seeks an order reviewing and setting aside the arbitration award of the first respondent (the commissioner) under case number LP3031-15 dated 12 October 2016; and substituting it with an order that the first respondent's (Mr Pooe) dismissal was substantively fair. Mr Pooe is opposing the review application.
- [2] The applicant's primary ground of review is that the commissioner misconstrued the nature of the enquiry and as such rendered an unreasonable award given the evidence that was before him.

Preliminary points

- [3] The applicant raises two preliminary points. Firstly, the authority and *locus standi* of the deponent to Mr Pooe's answering affidavit, Ms Nomkhosi Princess Khumalo (Ms Khumalo). Secondly, that Ms Khumalo has no personal knowledge of what transpired during the arbitration proceedings and as such the allegations made in the answering affidavit constitute hearsay evidence.
- [4] Ms Khumalo is employed by Association of Mine Workers and Construction Union (AMCU) as a paralegal and asserts that she is duly authorised by AMCU to depose to the answering affidavit. The answering affidavit does not explain the basis of AMCU's involvement in these proceedings. As a result, the applicant took this point in its replying affidavit. In response, Mr Pooe filed a confirmatory affidavit wherein he asserts that he is member of AMCU. As far as one can tell, Mr Pooe's membership with AMCU is not disputed.
- [5] In terms of section 2000 of LRA, if one or more of the trade union members is a party to the proceedings before this Court, the union may act in any one

¹ Act 66 of 1995 as amended.

or more capacities stipulated in section 200(1),² including acting on behalf of any of its members. Accordingly, AMCU is entitled to act on behalf of Mr Pooe in these proceedings and as such Ms Khumalo has authority and legal standing to depose to the answering affidavit.

[6] Coming to the second point *in limine*. Ms Khumalo asserts in the answering affidavit that she has personal knowledge as advised by Mr Pooe. This was subsequently confirmed by Mr Pooe in his confirmatory affidavit. Nothing turns on the filing of Mr Pooe's confirmatory affidavit in response to the applicant's objections. What is important is that it was filed as soon as the objection was raised.

[7] I hasten to mention that the LRA enjoins this Court to ensure expeditious resolution of industrial disputes. When it is clear that the parties have invested their efforts into resolving the dispute on the merits, this Court must not be bogged down with technicalities that serve only to delay the final determination on the merits.

[8] In my view, both points *in limine* are unmeritorious and, accordingly, stand to be dismissed.

Background facts

[9] Mr Pooe had been in the applicant's employ since 2003. He was dismissed on 12 April 2016 on charges of gross insubordination and racial slur. At the time of his dismissal he was an artisan assistant.

[10] In a nut shell, Mr Pooe was accused of gross insubordination in that he refused to obey a reasonable instruction that had been issued by Mr Rodney Blackler (Mr Blackler), a renewal foreman on 8 February 2016. The

² Section 200 states:

'(1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party—
 (a) in its own interest;
 (b) on behalf of any of its members;
 (c) in the interest of any of its members.'

instruction was directed to the crew of about nine employees who were working with Mr Blackler to clear the area (schoffel the grass) at the new workshop where they were going to move to. Mr Blackler asked Mr Lehlohonolo Fusi (Mr Fusi) to convey his instruction to the crew.

- [11] It is not disputed that the crew could not attend to the instruction as they were prevented by the safety officers. In fact, Mr Blackler conceded in cross-examination that he was not happy with the interference by the safety officers and then addressed them in his office.
- [12] With regard to the allegation of insubordination, Mr Blacker testified that Mr Pooe was rude to him during a meeting in his office on 8 February 2016 and made it clear that he was not going to do the work as instructed because there were people employed by the applicant to do that work. This was disputed by Mr Pooe who was adamant in his evidence that the crew could not attend the instruction because of the interference by the safety officers.
- [13] The applicant led the evidence of Mr Fusi with regard to the allegation of racial slur. He testified that after he had conveyed Mr Blacker's instruction the crew, Mr Pooe said to him *'This is South Africa, people have rights, this is not Lesotho'*. As a Mosotho, Mr Fusi was offended by the statement and reported it to his foreman. On 18 February 2016, Mr Pooe repeated his statement in a rude manner. Mr Fusi testified that he was frightened by the statement as it reminded him of the xenophobic attacks.
- [14] Mr Pooe testified that on 8 February 2016, Mr Blackler was not happy that the safety officers had stopped the crew from working without an assessment report. He then rudely confronted the safety officers stating that there is no democracy in his department. When he was requested Mr Blacker to repeat his statement, he was stopped by Mr Fusi who told him not to interrupt a white person when he is talking. It was then that he told Mr Fusi that in South Africa people have rights, this is not Lesotho. He denied that he ever spoke to Mr Fusi on 18 February 2018.

Evaluation

Insubordination charge

- [15] The commissioner rejected Mr Pooe's evidence that the safety officers had stopped the crew from working as *ipse dixit*.³ He arrived at this conclusion despite the common cause fact that indeed the safety officers had stopped the crew from working on 8 February 2018. The commissioner confirmed the finding of guilty on the charge of gross insubordination but found the sanction of dismissal to be too harsh. He ordered the reinstatement of Mr Pooe without back pay and with a final written warning valid for six months.
- [16] The applicant seems to be content with the findings in relations to the charge of insubordination. Similarly, Mr Pooe did not file a cross review. Even though the commissioner clearly misdirected herself, in light of the party's stance, I deem it unnecessary to deal with the commissioner's conduct. In any case, having perused the record, I am of the view that the finding in this regard is reasonable, nonetheless.

Racial slur

- [17] The applicant's impugn mainly pertain to the commissioner's finding that Mr Pooe is not guilty on the charge of racial slur. The commissioner is accused of misconstruing the nature of the enquiry and consequently rendered an unreasonable award.
- [18] The essence of the impugned finding is that the applicant failed to prove an offence of racial slur as both Mr Pooe and Mr Fusi are of African descent. The commissioner mentioned, incidentally, that the alleged utterances could have amounted to discrimination on the basis of the country of origin but Mr Pooe was not confronted with such an allegation.

³ Defines as 'an arbitrary and unsupported assertion' in the Collins Dictionary (<https://www.collinsdictionary.com/dictionary/english/ipse-dixit>).

- [19] The applicant's counsel, Mr Mkhathswa mounted a fervent attack on the commissioner's failure to find Mr Pooe guilty of '*some form of discrimination*' once it was clear that the racial slur allegation could not stand. The commissioner is faulted for taking a formalistic approach as a charge sheet need not be drafted with the precision of a legislative draftsman, so the argument went.
- [20] The applicant's submissions are untenable in the circumstances of this case. Unlike in the authorities referred to by Mr Mkhathswa,⁴ in this case, the charge sheet is very scrawny. To be precise, it states that: '*The following allegation(s) against your conduct has/have been made – Gross Insubordination/Racial Slur*'. Clearly, it makes no mention of the incident that led to the racial slur allegation.
- [21] It stands to reason that Mr Pooe was not apprised of the details of the racial slur allegation. In my view, the applicant's persistence with the submission that Mr Pooe ought to have been found guilty of '*some form of discrimination*' is ill-considered. Firstly, it is inconsistent with the finding of the chairperson that Mr Pooe was guilty of racial slur. It then backs the question as to how did the chairperson arrive at that conclusion if it is clear that race was not an issue, a fact conceded by the applicant. Secondly, the applicant is clearly asking this Court to endorse an approach which typifies a litigation by ambush. To convict an employee on a different charge to the one he/she was confronted with solely because the evidence that was adduced pointed in that direction would constitute a mistrial.
- [22] In *Head of the Department of Education v Mofokeng*,⁵ the Labour Appeal Court (LAC) appositely expounded the review test and pertinently stated that:

⁴ *Zeelie v Price Forbes (Northern Province)* (1) (2001) 22 ILJ 2053 (LC) at para 37; and *Woolwoths (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (LAC) [2011] ZALAC 15; [2011] 10 BLLR 963 (LAC); (2011) 32 ILJ 2455 (LAC) at para 32.

⁵ *Mofokeng* [2015] 1 BLLR 50 (LAC) at paras 30 to 33; see also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, ... this court in *Gold Fields* ... held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in the setting aside of the award. It must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome...

[23] In the present case, I am convinced that the commissioner aptly construed the applicable test and consequently rendered a reasonable award.

Conclusion

[24] In all the circumstances, the commissioner's findings cannot be assailed and as such the application stands to be dismissed.

[25] Mr Pooe did not pursue the issue of costs as he was represented by an AMCU official.

[26] In the premises, I make the following order:

Order

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

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate M Mkhathswa

Instructed by: Cliffe Dekker Hofmeyr

For the first respondent: Mr PD Marais

AMCU union official

LABOUR COURT