



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1620/15

In the matter between:

NKOTOLOANE MOEKETSI

Applicant

and

TRANSNET BARGAINING COUNCIL

First Respondent

PANELLIST TSHEPO MASHIGO

Second Respondent

TRANSNET ENGINEERING

Third Respondent

Heard: 13 September 2018

Delivered: 05 December 2018

Summary: Review application – dishonesty goes to the core of the employment relationship – seniority of the offender is an aggravating factor.

JUDGMENT

NKUTHA - NKONTWANA. J

Introduction

[1] The applicant was employed by the third respondent as the Employee Assistant Programme Manager (EAP Manager). He was charged with allegations relating

to dishonesty and four counts of gross negligence. The enquiry took a form of a pre-dismissal arbitration in accordance with section 188A of the Labour Relations Act¹ (LRA). The applicant was found guilty on all charges, but one. A sanction of a final written warning was mitted out on charges relating to negligence. He was, however, dismissed for dishonesty.

- [2] In this application, the applicant seeks an order reviewing and setting aside the arbitration award issued by the second respondent (arbitrator) under case number TBC2866/14, dated 3 July 2014. The applicant's impugn is limited to the finding that he was guilty of dishonesty and the sanction of dismissal. The third respondent is robustly defending the award.

Background facts

- [3] On 19 July 2013, there was an altercation between two of the third respondent's employees, Messrs Ndaba and Mpokotya. Mr Mpokotya reported the incident to Mr Davhana, their supervisor. Mr Davhana testified that he was not in a position to deal with the complaint on 22 July 2013 as he had other engagements out of office. He informed Messrs Ndaba and Mpokotya that he would deal with the compliant on 23 July 2013.
- [4] On Monday, 22 July 2013, Messrs Ndaba and Mpokotya resolved their dispute. They then went to the applicant and informed him that they had an altercation but had since forgiven each other. The applicant noted their arrangement.
- [5] The next day, 23 July 2013, Mr Davhana called Messrs Ndaba and Mpokotya to his office in order to attend to the complaint. They informed him that they had resolved their dispute and there was no need for his intervention. He was taken aback by the turn of events. He requested that their union shop steward, Mr Madondo, be called in. Mr Madondo confirmed that the dispute between Messrs Ndaba and Mpokotya was indeed resolved and there was no need for the meeting. Mr Davhana testified that he was never given the details of the agreement that resolved the dispute. Mr Madondo only told him that it was

¹ Act 66 of 1995 as amended.

resolved with the assistance of a senior person whose identity he did not revealed.

- [6] Mr Davhana requested Messrs Ndaba and Mpokotya to submit statements of what transpired and that Mr Ndaba apologised and Mr Mpokotya accepted his apology. He testified that he wanted proof that the dispute was indeed settled so that in future he would not be accused of not attending to the complaint. However, no statements were ever submitted.
- [7] On 11 September 2013, Mr Ndaba was charged and found guilty of the same incident that was allegedly resolved. A document purporting to be an agreement between Messrs Ndaba and Mpokotya was submitted in mitigation of the sanction. Mr Davhana objected to the admission of the document and ultimately it was not admitted. Mr Ndaba was accordingly dismissed. It is common cause that the alleged agreement was authored by Mr Madondo, who represented Mr Ndaba during his disciplinary enquiry. It was typed on 11 September 2013 and backdated to 22 July 2013, stating that:

‘Mr Themba Ndaba and Ntsikelelo Mpokotya

We would like to apologise to the situation that happened on 19/07/2013. On 22/07/2013 we decided to involve our union representative Mr Barry Madondo and the two elders that we work with Mr Mogajane and Mr Mofokeng unfortunately our line manager was not at work he was engaged with work related matters somewhere, as we wished to involve him but fortunately we managed to involve someone who is very professional in assisting employees in all difficult situations, Mr Ali Moeketsi the EAP (Employee Assistant Programme Manager)

The whole matter was resolved and closed at that platform. Mr T Ndaba and Mr N Mpokotya are very happy the way the matter was handled ... and would like to continue working together with peace and harmony.’

- [8] All the people mentioned in the agreement appended their signatures with their names and date, which was as 22 July 2013. What is interesting is that Messrs Mogajane and Mofokeng’s names and the date are hand written but still the date is reflected as 22 July 2013.

- [9] The applicant disavows involvement in any collusion to mislead Mr Ndaba's disciplinary hearing by creating an impression that the complaint by Mr Mpokotya had been resolved on 22 July 2013. He testified that he did not check the date as his focus was on the contents of the document.

Review test

- [10] Tersely put, the review test as postulated in *Head of the Department of Education v Mofokeng*,² is that where an arbitrator misdirects him or herself by ignoring material facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable. However, the arbitrator must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

- [11] The application is hinged on several grounds of review. However, I deem it expedient to deal only with the following:

11.1. The arbitrator committed a gross irregularity and/or misdirected himself in that he failed to appreciate the fact that the entire evidence before him did not point to gross violation of the third respondent's rule and/or regulations; a conduct which, if proven, could have attracted a sanction of dismissal.

11.2. The arbitrator committed a material error of law in that he failed to properly apply his mind to the facts and submissions which a reasonable arbitrator would have taken into account in making a decision.

11.3. The second respondent exceeded his powers in handing down the sanction without making reference to mitigating and/or aggravating circumstances of the sanction.

² [2015] 1 BLLR 50 (LAC) at paras 30 - 33; Subsequent to *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA) and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

Evaluation

- [12] There is no merit in the applicant's assertion that dishonesty is not a gross misconduct in terms of the third respondent's Disciplinary Code and Procedure (Code). Clause 6.6.3 of the Code clearly stipulates that submitting a false report or making false entries on documents or dishonesty are dismissible offences.
- [13] Also, the applicant's censure of the arbitrator's analysis of evidence is unwarranted. The applicant himself testified that he never participated in a meeting to resolve the dispute between Messrs Mogajane and Mofokeng but they informed him that they had resolve their dispute, a fact he noted. In my view, it is unfathomable that the applicant, who in his own words missed the fact the agreement was backdated because his focus was on the contents, appended his signature when the contents incorrectly suggests that he was part of the meeting and facilitated the resolution of the dispute between Messrs Mogajane and Mofokeng. The applicant was not the immediate supervisor of Messrs Mogajane and Mofokeng and had nothing to do with issues of discipline.
- [14] It is also common cause that the applicant attended Mr Davhana's Letsima (a unit meeting between supervisors and their subordinates), that was held the morning, a day after the dismissal of Mr Ndaba. In that meeting, the applicant criticised the black supervisors for not protecting fellow black employees and for dismissing them willy-nilly when their white counterparts were protecting white employees.
- [15] According to Mr Davhana, it was the applicant's conduct during the Letsima meeting that made him suspicious. He then recalled that the applicant was a party to the agreement that had been presented during Mr Ndaba's hearing. He confronted Messrs Ndaba, Mogajane and Mofokeng and they denied that there was ever a meeting to resolve the dispute as alleged in the agreement. Messrs Mogajane and Mofokeng told him that they were told by Mr Madondo to sign the document and backdate it. This evidence was never challenged.

[16] Accordingly, the arbitrator correctly found that the applicant was disingenuous when he signed the agreement.

[17] The mitigating circumstances would not have assisted the applicant since he was found guilty of dishonesty, a serious misconduct. I agree with the submission by counsel for the third respondent that the applicant was a senior employee and ought to have been well-advised of the implications of his role when he signed a misleading document.

[18] Confronted with the issue of the breakdown in the trust relationship occasioned by an employee's dishonest misconduct, the LAC in *Impala Platinum Ltd v Jansen and Others*,³ referring to *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others* with approval, stated:

[19] ...an 'employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is "a sensible operational response to risk management". (Emphasis added)

[19] Pertinently, with regard to remorse, the LAC also endorsed the judgment of *Schwartz v Sasol Polymers and Others*,⁴ where it was stated:

'While I agree ... that the lack of remorse shown by appellant is relevant, even if genuine remorse had been shown by him, this would only have been a factor to be considered in his favour in determining sanction and would not have barred his dismissal, remorseful or not, having regard to the seriousness of the misconduct committed.' (Emphasis added)

Conclusion

³ (2017) 38 ILJ 896 (LAC) at para 19.

⁴ *Supra*, reported at (2017) 38 ILJ 915 (LAC).

[20] It follows that the award is reasonable and unassailable. The review application stands to be dismissed. I am disinclined to award costs against the applicant as it will be inequitable.

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

Order

1. The review application 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:

Ms NN Zulu

From:

Kgokong Nameng Tumagole Attorneys

For the third respondent:

Advocate X Matyolo

Instructed by:

Maserumule Attorneys

LABOUR COURT