



IN THE LABOUR COURT OF SOUTH AFRICA HELD AT PORT ELIZABETH

Not Reportable

Case no: PR 218-16

In the matter between:

NUM obo MNGQOLA

Applicant

and

VSB CONSTRUCTION t/a TECHNI-CIVILS CC First Respondent

BARGAINING COUNCIL FOR THE

CIVIL ENGINEERING INDUSTRY

Second Respondent

MS M FOUCHE N.O.

Third Respondent

Heard: 28 February 2018

Delivered: 06 April 2018

JUDGMENT

WHITCHER J

- [1] The sole issue in this review is whether, in light of her finding that the dismissal of the applicant was substantively unfair, the third respondent ("the arbitrator") properly exercised her discretion to deny the remedy of reinstatement, which the applicant sought.

[2] The reasons provided by the arbitrator for denying reinstatement were that the applicant was not an honest witness during the arbitration proceedings and the trust relationship between he and employer had broken down irretrievably.

[3] Her decision not to award reinstatement appears to be also based on an unarticulated assumption that the restoration of the employment relationship might be strained because of Mr Du Plessis's¹ resentment at having been accused of racism.

[4] The arbitrator did not expressly state whether, in denying reinstatement, she was relying on subsections 193(2)(b) or 193(2)(c) of the Labour Relations Act, 1995. The sole authority on which she relied was *Maepe v CCMA*.²

Section 193(2)(b)

(5) I agree with counsel for the applicant that the arbitrator could not have invoked section 193(2)(b) on finding that the applicant was a "dishonest" witness.

[6] An inquiry into the effect of the employee's conduct on the trust relationship is relevant to whether dismissal was justified in the first place. The employee's conduct at the arbitration had no bearing on the trust relationship at the time of the dismissal.

[7] *Maepe* made it clear that section 193(2)(b) applies to the state of the employment relationship at the time of the dismissal. Zondo JP held:

[14] ...The situation envisaged in para(b) is where 'the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable'. It is possible that insofar as the

¹ The MD of the third respondent

² (2008) 29 IU 2189 (LAC)

giving of false evidence under oath may have occurred in the disciplinary enquiry before the dismissal, it could be said that it is one of the circumstances surrounding the dismissal, particularly where it was one of the factors that were taken into account in making the decision to dismiss. *However, it does not appear to me that the same can be said of a situation where the giving of false evidence only occurs in the arbitration or at the trial subsequent to the dismissal...*³

[8] The Labour Appeal Court in *Glencore Holdings and another v Sibeko and others*⁴ also held that behaviour post-dismissal should not be taken into account to infer a breakdown in the trust relation justifying departing from the primary remedy of reinstatement.

[9] In any event, given her findings on why dismissal was not an inappropriate sanction, the arbitrator could not possibly have found that a continued employment relationship would be intolerable.

[10] She found that what essentially lay at the heart of the controversy between the parties was an allegation that the applicant had falsely accused the respondent of being racist and he was therefore guilty of gross dishonesty.

[11] She, however, found that the applicant was *not guilty of gross dishonesty* because he was "obviously aggrieved and perhaps *for good reason*" by having a young white male appointed above him and given the benefit of a company vehicle, and in saying that the employer was racist he had merely expressed an opinion. In essence, she found that there was a reasonable basis for the applicant to have perceived the respondent's conduct as racist and for him to have made the comment. She found that the employer had "overreacted". She found that in all these circumstances, dismissal was not an inappropriate sanction. In simple terms there was an understandable misunderstanding between the parties.

³ Emphasis supplied

⁴ [2018] 1 BLLR 1 (LAC); (2018) 39 IU 138 (LAC)

[12] Finally, none of the employer's witnesses actually testified that a continued employment relationship would be intolerable.

Section 193(2)(c)

[13] It is evident that section 193(2)(c) of the LRA is of no application because there was no suggestion on the evidence that the 'functional role' performed by the applicant within the employer's organisation would be adversely affected by his conduct at the arbitration.⁵

[14] *Maepe* is distinguishable from this case. Maepe was a CCMA commissioner who was found to have lied under oath. The LAC found reinstatement "impractical" because, as a commissioner, Maepe would himself have been required to administer the oath.

Order

[15] The relief granted to the applicant by the third respondent is set aside and replaced with an order of reinstatement with effect from the date of his dismissal.

[16] The third respondent is ordered to pay the applicant's costs.

B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

⁵ *Glencore Holdings and another v Sibeko and others* held that section 193(2)(c) was relevant to the core operational requirements of an employer and that this proposition is made clear in *Maepe*.

For the applicant: J G Grogan, instructed by Wesley Pretorius & Associates

For the first respondent: Snyman Attorneys