

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1775/17

In the matter between:

THEBE INVESTMENT CORPORATION (PTY) LTD

Applicant

and

MONI, NATASHA N.O

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

VERONICA MAFANYA

Third Respondent

Heard: 4 September 2019

Delivered: 20 September 2019

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction.

[1] In this application, the applicant, Thebe Investment Corporation (Pty) Ltd (Thebe), seeks an order reviewing and setting aside the arbitration award issued by the first respondent, Natasha Moni (commissioner) under case number GAJB26261-16, dated 5 July 2017, under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner made the following award:

- ‘1.1 The applicant’s dismissal is both procedurally and substantively unfair.
- 1.2 The respondent is to pay 12 x R31 604.00 which amount to R379 248.00 (three hundred and seventy-nine thousand two hundred and forty-eight rand) to the applicant within 14 days from receipt of the award.
- 1.3 No order as to costs.’

- [2] Thebe contends that the commissioner committed a gross irregularity, misconceived the nature of the inquiry and arrived at a decision that no reasonable decision maker could have arrived at.
- [3] The application is only opposed by the third respondent, Ms Veronica Mafanya (Ms Mafanya).

Factual context

- [4] Ms Mafanya was in the employ of Thebe as Personal Assistant with effect from 2 August 2009. At the time of her dismissal, on 4 November 2016, Ms Mafanya held a position of Team Assistant.
- [5] Thebe is an investment company with two divisions, Thebe Services Division (TSD) which focuses on investments in the services industry and Thebe Energy and Resources Division (TER) which focusses on investments in the energy resources sector.
- [6] Thebe underwent two interrelated phases of retrenchment in 2016. Phase 1 retrenchment process (Phase 1) was concluded in May 2016. The business rationale for Phase 1 was primarily to cut costs.
- [7] Prior to Phase 1, the Chief Executive Officers (CEO's) of the respective divisions had their own Personal Assistants. Consequent to Phase 1, the Personal Assistant positions were merged with the Team Assistant positions. The Personal Assistant positions became redundant as Team Assistants performed the same duties. One Team Assistant was allocated to support Mr Sizwe Mncwango (Mr Mncwango), TER CEO and Mr Jerry Mabena (Mr Mabena), TSD CEO.
- [8] A number of the Personal Assistants were retrenched during Phase 1. Ms Mafanya was, however, one of the Personal Assistants that were appointed to the position of Team Assistant and specifically to support Messrs Mncwango and Mabena.
- [9] Thebe also communicated its intention to undertake Phase 2 restructuring process (Phase 2) and the initial focus was solely to restructure the Finance Department pursuant to the introduction of the new system.

- [10] At the conclusion of Phase 1, it became apparent to Thebe that the cost cutting objectives had not been achieved. In order to archive the level of costs cutting, Thebe contemplated broadening the scope of Phase 2, which meant that positions other than those that were in the Finance Department would be affected as well. The additional cost cutting intention of Phase 2 was not disclosed to the employees during Phase 1 because it was only contemplated by Thebe after Phase 1 had been concluded.
- [11] Phase 1 was not well received by the employees and had a severe negative impact on the morale of those that were not retrenched. Thebe had to embark on a very strong change management intervention aimed at restoring trust, faith and confidence of its employees.
- [12] The introduction of an additional purpose of Phase 2, which had a potential to affect the job security of a number of people other than those employed in the finance department, had to be managed carefully in order to ensure that it did not ignite a widespread drop in morale and productivity throughout the company once more. As a result, the discussions contemplating the extension of the scope of Phase 2 were kept highly confidential until such time that Thebe had a clear idea as to who they believed would be affected by the retrenchments occasioned by the additional costs cutting intention of Phase 2.
- [13] The prospect of such retrenchments could not, before it reaches the appropriate level of clarity, be disclosed to all the managers or Executive Committee (Exco) members. In order to maintain the required level of confidentiality during the contemplated phase of the additional cost cutting intention of Phase 2, the following measures were adopted:
- 13.1 Only three people were privy to such contemplating discussions, namely Mr Vusi Khanyile (Mr Khanyile), Chairman of the Board of Directors; Ms Amanda Earle (Earle), Human Resources Manager, and Mr Mncwango.
 - 12.2 All the discussions were incorporated in a single document that was only shared between the above mentioned three individuals. It was electronically saved on Mr Mncwango's desktop computer under the

heading 'Cost Containment/Restructuring' (Phase 2 document) and there were no hard copies printed.

- [14] According to Thebe, the Phase 2 document was a spreadsheet that contained the names of all the people that could and could not possibly be affected by the retrenchment. This list was not finalised and was only a discussion document.
- [15] Sometime in September 2016, before Phase 2 commenced, one of the employees approached Mr Mncwango and informed him about a rumour that Thebe was planning on 'chopping heads once more'. The name of the person who approached Mr Mncwango was never disclosed.
- [16] Mr Mncwango suspected Ms Mafanya as the source of the rumour since she had access to his office and could have seen the contents of the Phase 2 document. He confronted Ms Mafanya twice on whether she had disclosed the contents of the Phase 2 document but she denied. It was only on the third occasion that she conceded to disclosing the contents of the Phase 2 document.
- [17] On 21 October 2016, following a meeting with Mr Mncwango and Ms Earle, Ms Mafanya was issued with a notice of suspension and notice to attend a disciplinary hearing in terms whereof she was charged with two charges framed as follows:
- 'Breach of confidentiality and/or dishonesty – in that on 19 December 2016, when confronted about disclosing confidential information regarding a possible retrenchment exercise to a colleague, you initially declined before admitting to the disclosure. Which resultantly put the company at risk, and unsettled the staff with information that is not confirmed and /or made known to the employees.'
- [18] The chairperson of the disciplinary enquiry found Ms Mafanya guilty as charged and recommended a sanction of dismissal. Ms Mafanya lodged an internal appeal which was unsuccessful. Ms Mafanya then referred the matter to CCMA. The arbitration proceedings sat after a failed conciliation and the commissioner rendered the impugned award.

The arbitration proceedings

[19] At the commencement of the arbitration proceedings, Ms Mafanya's attorney summarised the issues in dispute as follows:

19.1. On procedural fairness, Ms Mafanya took issue with the fact that Mr Mncwango was the initiator and the person who ultimately affected her dismissal as per the recommendations of the chairperson of the disciplinary enquiry. Also that Mr Mncwango was also involved in the appeal process.

19.2. On substantive fairness, Ms Mafanya conceded that she did share the information with a colleague but disputed the fact that it was confidential. She also took issue with the fact that the Phase 2 document contained the details of the employees' names who were going to be effected by the Phase 2 restructuring.

[20] Mr Mncwango testified that the planning discussion on Phase 2 commenced around August or September 2016. The Phase 2 document was the working document in a form of a spreadsheet with the names of the employees who would be affected and the comments on each individual using different colours. The Phase 2 document was saved on his computer icon and remained there until he had finished working on it.

[21] Before the commencement of Phase 2 by the issuing of section 189(3) of the Labour Relations Act¹ (LRA) notices, Mr Mncwango was approached by someone who accused him of intending on chopping heads. That was during late September 2016 and early October 2016. The Phase 2 section 189 notices were only issued early November 2016.

[22] When confronted, Ms Mafanya denied that she had seen the Phase 2 document, Mr Mncwango told Ms Mafanya that he was going to investigate the matter but would not want to go behind her back, hence he confronted her. It was when she was confronted for the third time that she conceded that she had seen the Phase 2 document and discussed it with someone. That she did during the meeting with Mr Mncwango and Ms Earle on 21 October 2016.

¹ Act 66 of 1995 as amended.

- [23] It was HR that processed the applicant's dismissal after receiving the findings and recommendations from the chairperson of the disciplinary enquiry which were duly accepted by Mr Mncwango. Mr Mncwango denied that he participated in the appeal process. It was Mr Khanyile who dealt with the appeal.
- [24] On the other hand, Ms Mafanya testified that she only saw the heading but not the entire Phase 2 document. She was adamant that she never saw a spreadsheet with peoples' names. However, Ms Mafanya conceded that she did speak to Ms Nobuzwe, one of Thebe's executives, about the Phase 2 document that she had seen on Mr Mncwango's laptop.
- [25] It was her evidence, further, that She was very disappointed with Ms Nobuzwe because she, Ms Nobuzwe, used to discuss confidential issues that had been discussed during the Exco meetings and she, Ms Mafanya, never told Mr Mncwango about them. As a result, she confronted Ms Nobuzwe who denied ever telling Mr Mncwango about their conversation.
- [26] She lodged an appeal solely because she was challenging the procedure that led to her dismissal and the harshness of the sanction.
- [27] When she was quizzed about lying twice when Mr Mncwango approached her, she said that she had panicked. She testified that Ms Nobuzwe knew about the contents of the Phase 2 document because it was discussed during Exco meetings. However, this version was not put to Mr Mncwango.
- [28] Ms C Brown who was called by the applicant confirmed Mr Mncwango's evidence that Phase 2 was only aimed at the Finance Department and that the commencement date was never communicated to the staff during Phase 1.

Review test

- [29] The review test is comprehensively spelt out in *Sidumo and Another v Rustenburg Platinum Mines*² and subsequently expounded in various *dicta* of both the Supreme Court of Appeal (SCA) and the Labour Appal

² See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) paras 78 and 79.

Court (LAC).³ Pertinently, in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*,⁴ LAC underscored the fact that:

[15] ...the Labour Court's approach to the review of the Commissioner's award transcends the mere identification of process related errors to reveal the Commissioner's basic failure to apply his mind to considerations that were material to the outcome of the dispute, resulting in a misconceived hearing or a decision which no reasonable decision-maker could reach on all the evidence that was before him or her.

[16] Significantly, as was held by the SCA in *Herholdt* and endorsed recently by this Court in *Head of the Department of Education v Jonas Mohale Mofokeng and Others*, 'for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result'. Thus, as recognised in Mofokeng, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator 'must not misconceive the inquiry or undertake the inquiry in a misconceived manner', as this would not lead to a fair trial of the issues. In further approval of *Herholdt*, this Court in *Mofokeng* stated that:

'Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no

³ See: *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC). *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

⁴ 2014] ZALAC 81; [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC) at paras 15 to 16.

reasonable decision-maker could reach on all the material that was before him or her.' (Emphasis added)

Did Ms Mafanya disclose confidential information?

- [30] The commissioner found that there was sufficient evidence to substantiate the Thebe's allegation that Ms Mafanya had discussed the Phase 2 document she had seen on Mr Mncwango's laptop headed 'cost containment/restructuring. However, there was insufficient evidence to prove that she had disclosed the contents.
- [31] In reaching this conclusion, the commissioner was clearly oblivious of the concession by Ms Mafanya that she did discuss the Phase 2 document with Ms Nobuzwe because she was afraid. She also testified that she was angry with Ms Nobuzwe as she did not expect her to go and tell Mr Mncwango because she, Ms Nobuzwe, used to tell her confidential information that had been discussed during Exco meetings. Also, if Ms Mafanya only saw the heading of the Phase 2 document, what was difficult with being upfront with Mr Mncwango the first time she was confronted.
- [32] Matters got worse for Ms Mafanya because her main defence was that the information she had disclosed had already been public knowledge. However, the heading of the Phase 2 document only stated 'costs containment/restructuring' and it is common cause that there was no date indicated. It is, therefore, difficult to perceive how Ms Mafanya managed to fathom that the document pertained to the eminent Phase 2 retrenchments without opening and reading the contents thereof.
- [33] Mr Mncwango's evidence that the scope of Phase 2 was extended to include cost cutting measures that affected the whole of the organisation and that the discussion in that regard was top secret was not challenged. Also, Mr Mncwango testified that Thebe was seriously prejudiced because the information that had been disclosed was highly confidential and sensitive as the scope of the Phase 2 restructuring had not been crystallised and communicated formally. The Phase 2 document was a work in progress but already contained names of employees whose positions had been considered for restructuring, so he further testified. This evidence was never challenged.

- [34] In the light of Mr Mncwango's unchallenged evidence, nothing much turns on the minute of the meeting of 21 October 2017. Notwithstanding, Ms Mafanya conceded that she did indeed confess to the disclosure of the contents of the Phase 2 document as duly recorded in the minute. Obviously, there was no need to call Ms Earle to testify.
- [35] In my view, the only conclusion that should have been deduced from the common cause facts and the unchallenged evidence ought to have been that the applicant saw the confidential information contained in the Phase 2 document that was on Mr Mncwango's laptop and discussed it with Ms Nobuzwe. In doing so, Ms Mafanya disclosed the confidential information without permission. Therefore, there is no merit in the submission by Mr Sineke, who appeared on behalf of the applicant, that Thebe failed to prove that Ms Mafanya disclosed the confidential information.

Was Ms Mafanya dishonest?

- [36] Ms Mafanya was offered an opportunity to be upfront with Mr Mncwango twice but to no avail. She was ultimately constrained to confess her misdeed when she saw that Mr Mncwango was not budging. Clearly, the commissioner's finding that 'her lie was not deliberate' is incongruous with the evidence that was before her. In any event, even that confession was superficial and ephemeral. Ms Mafanya subsequently denied ever seeing the contents of the Phase 2 document despite a concession that she did discuss it with Ms Nobuzwe.
- [37] Mr Orton, who appeared on behalf of Thebe, correctly submitted that Ms Mafanya was insincere and unrepentant. Mr Sineke did not even attempt to address this issue in his submissions for obvious reasons.

Was the sanction of dismissal appropriateness?

- [38] Ms Mafanya was an assistant to two CEO's and inherent in that position is the confidentiality undertaking as she had access to confidential information that other ordinary employees and executives would not normally be privy to. In this instance, she conceded during cross examination that the information contained in the Phase 2 document was confidential even though she was adamant that she only saw the heading.

- [39] Given my findings above, the probabilities support the version of Thebe that Ms Mafanya did see the confidential information contained in the Phase 2 document which she, in turn, disclosed to Ms Nobuzwe.
- [40] It is a well-accepted principle that dishonesty offends the core of the employment relationship, which is trust, especially in the circumstances typified in this matter. Ms Mafanya was a Team Assistant who, by virtue of her position, was expected to demonstrate the utmost good faith in her dealings with offices of the CEO's. It is without doubt that the breach of utmost good faith in this instance rendered the continued employment relationship intolerable. Moreover, Ms Mafanya did not show even a trickle of contrition.
- [41] In *Theewaterskloof Municipality v SALGBC and Others*,⁵ quoted with approval by the LAC in *Sylvania Metals (Pty) Ltd v Mello N.O. and Others*,⁶ where this Court 'recognised that the general principle is whether the conduct of the employee is incompatible with the trust and confidence necessary for the continuation of the employment relationship; and that where an employee has been afforded an opportunity to correct his or her behaviour and nevertheless persists in taking a confrontational course 'there can be very little room for the notion of corrective discipline'.
- [42] Clearly, Ms Mafanya's clean disciplinary record and personal circumstances could not have been of any assistance.

Procedural fairness

- [43] Mr Mncwango's role during the disciplinary enquiry and the internal appeal were the only issues in dispute on procedural fairness. Ms Mafanya seemed to have bemoaned the fact that Mr Mncwango was the initiator during her disciplinary enquiry and subsequently accepted the chairperson's findings and recommendations.
- [44] It is not clear, nonetheless, as to how Ms Mafanya was prejudiced by such conduct as no evidence was led in this regard. However, Mr Mncwango testified that the chairperson of the disciplinary enquiry was an external

⁵ (2010) 31 ILJ 2475 (LC) at para 37.

⁶ (JA83/2015) [2016] ZALAC 52 (22 November 2016) at para 27. Unreported.

person whose recommendation had to be endorsed by Thebe and that is what he did as the TER's CEO.

[45] Also, Mr Mncwango's evidence that he was never involved in the appeal process was never challenged.

[46] The commissioner clearly misdirected herself by pronouncing on issues that were not in dispute. In the final analysis, it is clear that the procedure that Thebe had followed during and preceding Ms Mafanya's dismissal was in accordance with the test outlined in *Avril Elizabeth Home for the Handicapped v CCMA and Others*⁷ referred to by the commissioner.

Conclusion

[47] In all the circumstances, the commissioner failed to apply her mind to issues which, as shown above, were material to the determination of the dispute. As a result, she clearly misconceived the nature of the enquiry by failing to deal with the issues raised for determination; which were disclosure of confidential information and dishonesty.

[48] I am satisfied that the award cannot stand as it is not sustainable on the facts of this case and certainly does not fall within the category of reasonable decision makers.

Remedy

[49] In the interest of justice, I am hesitant to remit this matter back to the CCMA because of the consequential delays. Also, there is no challenge on the adequacy of the record of the arbitration proceedings. As such, I am in a position to deal with the matter to finality.

[50] Given the findings I have arrived at above, it is clear that the dismissal of Ms Mafanya was substantively and procedurally fair.

Costs

[51] In accordance with the requirements of the law and fairness, each party must carry its own costs.

[52] In the result I make the following order.

⁷ (2006) 27 ILJ 404 (LC); [2006] 9 BLLR 833 (LC).

Order:

1. The arbitration award dated 5 July 2017 issued under case number GAJB26261-16 is reviewed and set aside and substituted with the following order:
 - 1.1 The dismissal of the third respondent, Ms Mafanya, is substantively and procedurally fair.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr R Orton of Snyman Attorneys

For the Respondents: Mr W Sineke of Sineke Attorneys