

SOUTH AFRICA / JUDGMENT

Abrahams v Commission for Conciliation, Mediation and Arbitration (CCMA) and Others; Freedom Park v Abrahams and Others (JR268/13; JR516/13) [2015] ZALCJHB 457 (19 February 2015)

[2015] ZALCJHB 457

COURT

Labour Court Johannesburg

BEFORE

Beaton AJ

CASE / FILE NUMBER

JR268/13; JR516/13

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IN

**THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)****Not Reportable****Case Number: JR 268/13****JR516/13****In**

the matters between:

M.R.
ABRAHAMS
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION
First
Respondent
AND
ARBITRATION ("CCMA")
KHOMOTJO
MATJI N.O.
Second
Respondent
FREEDOM
PARK
Third

Respondent

FREEDOM

PARK

Applicant

M.R.

ABRAHAMS

First

Respondent

CCMA

Third

Respondent

Heard: 07 January 2015

Delivered: 19 February 2015

Summary

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Section

188A dismissal for failure to disclose an interest in a tender.

Evidence not establishing a disclosable interest.

Review

–

Section

188A dismissal. Employee found not guilty by Commissioner on charges of authorising wasteful expenditure. Employee clearly

had to consider

all factors, including fact that employer caused some services not to be rendered. Expenditure in such circumstances

authorised and not

wasteful. Commissioner's award not reviewable on this basis.

JUDGMENT

BEATON AJ

[1] As can be gleaned from the heading this judgment is given in respect of two distinct, but interrelated review applications involving the same parties. Freedom Park (to which I shall refer as “the employer”) is a cultural institution as contemplated in section 3(1) of the Cultural Institutions Act,

1998. From 1 January 2006 until 24 December 2012 it employed Mr M.R. Abrahams (to whom I shall refer as “the employee”) as its Departmental Head: Heritage and Knowledge. On 24 December 2012 the employee was dismissed, effectively by Commissioner Khomotjo Matji (to whom I shall refer as “the Commissioner”) of the CCMA, following a pre-dismissal arbitration procedure as contemplated in section 188A of the Labour Relations Act, 1995 (“the Act”). In his award of 24 December 2012 the Commissioner directed, in terms of section 188A(9) of the Act that the employee should be summarily dismissed. This direction followed a finding that the employee was guilty of 1 of 4 charges of misconduct alleged by

the employer. In his award, at paragraph 162 the Commissioner formulated the charge of which the employee was guilty as follows:

“...contravention of section 4.3.2.12 of Freedom Park’s Disciplinary Code and Procedure in that he failed to disclose his indirect interest in Under Pressure Agency arising from his relationship with Giselle Baillie;”

The Commissioner found the employee not guilty of the other charges which had been brought by Freedom Park.

- [2] It bears mention, at this stage, that, as at the date of his dismissal, the employee was employed on a fixed term contract (which followed a previous fixed term contract) which was to expire on 31 March 2013. He earned a monthly salary of R68 827,08 at the date of his dismissal.
- [3] Aggrieved by the decision of the Commissioner the employee launched a review application in respect thereof during February 2013. That is the first application in the heading above. The relief sought in that application was that the award of 24 December 2012 be reviewed and set aside and that there be substituted for the award of the Commissioner one to the effect that the employee was not guilty of any of the charges brought against him by his employer. The second leg of the relief sought was accompanied by two alternatives – one that the award be substituted with a penalty less severe than dismissal and the second that the matter be remitted to the CCMA for a fresh hearing before another Commissioner. Faced with this application the employer, during March 2013, brought a review application in respect of the Commissioner’s finding that the employee was not guilty of the 2nd to 4th charges which he had faced during the pre-dismissal arbitration process. That application was conditional upon the employee’s

review application succeeding. Since it was launched outside the 6 week period contemplated in section 145 of the Act, it was accompanied by an application for condonation. I granted that application at the commencement of proceedings on 7 January 2015 and

simultaneously gave reasons for such order, which I do not intend to repeat here.

- [4] The first matter to consider is thus the employee’s review application, as a lack of success on his part in this application renders a decision on the employer’s application unnecessary. Various grounds, including a contention that the delay between the Commission of the offence (2009 – early
- 2010) and the institution of the disciplinary hearing (May 2012) rendered the disciplinary process irregular and thus susceptible to being reviewed, were advanced in the founding affidavit of the employee. During argument Mr Grundlingh, appearing for the employee, confined himself to one ground, being that the Commissioner never identified the nature of the relationship between the employee and Under Pressure Agency that the employee should have, but did not, disclose. Narrowly coupled to this contention was one that the evidence did not disclose a relationship between the employee and either Under Pressure Agency or

Gizelle Baillie that the employee was obliged to disclose.

- [5] Before evaluating the merits of these submissions some facts and the applicable regulatory provisions need to be set out. It was common cause during the arbitration hearing that:
- (a) Under Pressure Agency was the trading name of Giselle Baillie CC, whose sole member was Giselle Baillie;
 - (b) An employee of the employer other than the employee (Mr E F Buthelezi) secured quotes from 3 service providers whose names were provided by the employee as well as another entity. These quotes were for the provision of Object curator services. (Dagmark Agency). Dagmark's quote was the lowest but not accepted on the employee's advice as the quote expressly stated that other charges might also be levied;
 - (c) The employee had, prior to his commencing employment with the employer, been involved in a joint venture with Under Pressure Agency

and had developed a friendship with Giselle Baillie. That friendship endured after his employment by the employer and was expressly found by the Commissioner not be a romantic liaison. This finding was accepted by the employer. The employee described Ms Baillie as a "good friend" during his evidence before the Commissioner.

The charge on which the employee was dismissed reads as follows in the notice of 21 August 2012 by the employer to him, advising of the referral of a pre-dismissal arbitration to the CCMA:

"You are charged with contravention of section 4.3.2.12 of Freedom Park's Disciplinary Code and Procedure read with sections 10.3 and 17.30 of Freedom Park's Supply Chain Management Policy as well as section 2.2 and 2.3.3 of Freedom Park's Policy on Declaration of Direct or Indirect Interest and Gifts in that you knowingly omitted to disclose your indirect interest in the company Giselle Baillie CC trading as Underpressure Agency which arose by virtue of your friendship and/or relationship with a member of the company, one Giselle Baillie during the course of procuring the provider for the Object Curator project".

The applicable regulatory measures are thus:

- (e) Section 4.3.2.12 of the Employer's Disciplinary Code and Procedure. That sub-section, to be found at p1059 of the record, refers to:

"Providing false information in or knowingly omitting relevant information from an application for employment or when undergoing a medical examination or in the cause (sic) of ones (sic) work".

- (b) Section 10.3 of the employer's Supply Chain Management Policy provides that:

"If a SCM (Supply Chain Management) practitioner or other role player, or close family member, partner or associate of such practitioner or other role player, has any private or business interest in any contract to be awarded, that practitioner or other role player must:

- Disclose that interest;

· Withdraw from participating in any manner whatsoever in the process relating to the contract”.

- (c) Section 17.30 of the same document requires an employee involved in the procurement process to declare that he/she complies with the Prevention and Combating of Corrupt Activities Act. This aspect of the charge played no part in the Commissioner’s reasoning in finding against the employee on the first charge and need not be considered further.
- (d) Section 2.2 of the Employer’s Policy on Declaration of Direct or Indirect Interest and Gifts, reads as follows:

“Council members and officials of Freedom Park shall declare, by way of a notice in writing, direct or indirect business interests that he/she or a family member may have in any contract/tender or proposed contract/tender which has been or is to be entered into by the Freedom Park or who so becomes interested in any such contract/tender after it has been entered into”.

The provisions of section 2.3.3 of that policy merely assert that non-compliance with the policy renders the council member or official

concerned “...guilty of an offence”. Whether it is a disciplinary or criminal “offence” is not stated but the section is irrelevant to a consideration of the question with which I am seized.

- [6] As indicated above the Commissioner did not identify the interest in Giselle Baillie CC held by the employee that should have been disclosed. When asked during argument of the review applications what that interest was Mr Van der Westhuizen, who appeared for the employer, submitted that it was the friendship between the employee and Giselle Baillie, the individual who was the sole member of Giselle Baillie CC, to which reference has been made above. Indeed, on the available evidence he could not have submitted otherwise.
- [7] In my view that friendship could not constitute the type of interest which is the target of the regulatory measures set out above. Section 10.3 of the Supply Chain Management Policy describes the natural persons and their relationship to the official or employee concerned, which triggers the duty of disclosure. Those persons do not include a “friend”. Mr van der Westhuizen submitted further that the employee had a “private interest” in the contract being procured because of his friendship with Giselle Baillie. In my view such a construction strains the natural meaning of the words concerned. It is the interest of the described persons in the contract, not the entity concluding the contract, that requires disclosure.
- [8] Extending the provisions in question to a friendship relationship also creates uncertainty. What degree of friendship is required to trigger the disclosure duty? When faced with this question Mr Van der Westhuizen provided no answer but referred to the employee’s evidence that Giselle Baillie was his “good friend”.
- [9] The provisions of the Policy on Declaration of Direct or Indirect Interest and Gifts are even narrower, applying only to Council members, officials and (their) family members. Clearly Ms Baillie was not a family member of the employee.

- [10] Accordingly I am of the view that the Commissioner's conclusion that the employee had an interest that required disclosure was not one that a Commissioner could reasonably have reached on the evidential material (the provisions of the policies quoted above and the evidence that the employee and Giselle Baillie were good friends) before him. Accordingly the finding that the employee was guilty of the first count of misconduct with which he was charged, and the concomitant penalty of summary dismissal, fall to be reviewed and set aside.
- [11] During argument I enquired of Mr Van der Westhuizen if his client agreed to an order for the payment of the employee's outstanding salary in respect of the period 24/12/2012 – 31/03/2013 if the employee's review succeeded and the employer's review application did not result in an order dismissing the employee. He undertook to revert to me and has done so, indicating that he was unable to secure such agreement. The ensuing order is thus not necessarily the final chapter of this litigious saga.
- [12] I shall consider the question of the costs of the employee's review application after addressing the employer's review application.
- [13] I find it convenient first to deal with the Commissioner's approach to Count 4 and thereafter the way in which he dealt with counts 2 and 3. In order to do justice to the employer's attack on the way in which the Commissioner dealt with Count 4 it is necessary to quote that charge in full. It reads as follows:

"You are charged with gross dishonesty in that you deliberately manipulated or compromised the integrity of the tender process by

using your position of authority to influence the decision of the supply chain officer against going on a public tender and/or

recommending acceptance of the proposal with the highest quote for object curator and/or omitting to disclose your direct or indirect

interest in Under Pressure Agency that the tender is awarded".

- [14] The Commissioner, in finding the employee guilty of the first charge held, at paragraph 131 of his award that:

"The withholding of information or making of a false statement or misrepresentation is deceitful conduct and constitutes dishonesty".

That statement is clearly correct but needs to be qualified by the assertion that a non-disclosure is only deceitful when there is a duty on the person concerned to make the disclosure. (See: *Laltoparsat v Webber Wentzel Bowens* 92004) 25 ILJ 371 (CCMA) at 374B. Although that matter was concerned with an alleged non-disclosure in a CV by an Applicant for employment, the same principle applies to this matter.

- [15] The Commissioner, in paragraph 154 of his award, held that to find the employee guilty on this charge, in addition to the first charge, would amount to an improper splitting of charges – he should perhaps have said convictions. That argument cannot be sustained in these proceedings since I have found that the first charge cannot be sustained. The fourth charge thus has to be considered on its merits.
- [16] The charge, it should be remembered, is that the employee was grossly dishonest. The mere manipulation of a tender process is not dishonest – it may be improper and even unlawful. But without the element of non-disclosure referred to in the charge there is no dishonesty. Given my finding above that there was no duty to disclose the relationship between the employee and Giselle Baillie, this charge was not established by the evidence before him. Even if I am wrong on this score the evidence showed that when he commenced employment the employee made a detailed disclosure of his prior involvement with Giselle Baillie CC and the individual, Giselle Baillie. His conduct in not disclosing it again, 3 years later, cannot be said to be dishonest.
- [17] The thrust of charges 2 and 3 was that the employee permitted or authorised expenditure by the employer to Under Pressure Agency for services that were not rendered and thus was party to unauthorised or wasteful expenditure. Mr Van der Westhuizen very properly conceded that there was no difference, in substance, between the charges. The reason advanced by the Commissioner for finding that these charges were not established was that the areas of non-performance were occasioned by the employer's failings –

its failure to furnish conservation and storage facilities and its failure to make practical arrangements for workshops at which skills were to be transferred were 2 examples mentioned. The employer's argument that the employee was guilty of the thrust of these charges for having authorised payments for work not done is, in my view,

somewhat simplistic. He had detailed reports as to why the work was not done and would have had to consider whether non-payment would expose the employer to a claim based on fictional fulfilment of Under Pressure Agency's obligations. A failure to consider this aspect of the matter would have amounted to a dereliction of the employee's duties. In my view the employee did nothing wrong in authorising these payments.

- [18] In my view the Commissioner's distinction between accountability and responsibility is artificial. The employee clearly played a significant role in both monitoring the services rendered by Under Pressure Agency and authorizing or initiating payments for such services. The basis of the Commissioner's award in respect of charges 2 and 3, insofar as it comprised of a finding that the employee was not responsible or accountable for the expenditure in question is not one that can reasonably be sustained on the evidence advanced. However, given the contents of the immediately preceding paragraph, his award on this part of the case does not fall to be reviewed or set aside.

[19] Mr Grundlingh argued that to deprive the employee of his costs would render the whole award process meaningless for him as he would lose the monetary award gained thereby. I do not agree – his good name has been restored and, given the small world that comprises the museum and artefact industry, this is not a Pyrrhic victory. I am persuaded, however, that the employer's opposition to the employee's review application was ill-

advised and should attract an appropriate costs order. The counter-application (perhaps not properly called that) was, however,

properly and almost necessarily brought as evidenced by the fact that a fresh determination of the merits of charge 4 was required.

In the premises I make the following orders:

In Case Number JR268/13:

- (a) The pre-dismissal arbitration award by Commissioner Khomotjo Matji under case no GATW9229-12 of First Respondent, dated 24 December 2012, is reviewed and set aside.
- (b) The said award is substituted with one that the Applicant is not guilty of any of the charges brought against him by Third Respondent and the dismissal effected in the award is set aside.
- (c) Third Respondent is to pay the costs incurred by Applicant as a result of its (Third Respondent's) opposition.

In Case Number JR516/13:

- (a) The application is dismissed.
- (b) There is no order as to costs.

Beaton AJ

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant: Advocate Riaan Grundlingh

Instructed by:

Bester & Rhoodie Attorneys

For the Respondent: Advocate Gvd Westhuizen

Instructed by:

MacRobert Inc

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