

SOUTH AFRICA / JUDGMENT

AMCU obo Tlhaganyane v Beesnaar N.O and Others (JR 2970/19) [2023] ZALCJHB 201; (2023) 44 ILJ 2210 (LC) (6 July 2023)

[2023] ZALCJHB 201

COURT

Labour Court Johannesburg

BEFORE

Sethene

CASE / FILE NUMBER

JR 2970/19

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Reportable

Case

No: JR

2970/19

In

the matter between:

AMCU
OBO E. TLHAGANYANE
Applicant
and
S.
M. BEESNAAR
N.O.
1st Respondent
COMMISSION
FOR CONCILIATION MEDIATION AND
2nd Respondent
ARBITRATION
ASSMANG
LIMITED (BLACKROCK MINE)
3rd Respondent

Heard:

18/08/2022

Delivered:

06/07/2023

Summary: Review application in terms of s 145 of the LRA-whether the arbitrator's award is reviewable. The arbitrator ignored material evidence placed before him. Held: (1) The arbitrator's award is reviewed and set aside and it is replaced by the order that the dismissal of the employee was substantively unfair. (2) The employee is hereby reinstated with immediate effect from the date of his dismissal with all the benefits and emoluments that existed prior to his dismissal. (3) There is no order as to costs.

JUDGMENT

SETHENE AJ

Introduction

“There was simply no shred of evidence to buttress or lend credence to the allegation of misconduct. It is beyond my comprehension why the appellant (applicant in this case) was charged for misconduct at all.”^[1] *[emphasis added]*

[1] Without tangible evidence and on the balance of probabilities, the employer cannot dismiss an employee premised on misguided belief of dishonesty and misrepresentation without instituting an investigation

to properly establish the facts.

[2] In this case, which is the first of its kind in our employment law jurisprudence, the employer dismissed the employee for dishonesty and misrepresentation allegedly contained in the particulars of claim in civil litigation instituted by the employee against the employer. The particulars of claim were drafted, signed, filed and served by the

employee's attorney who admitted under oath, human error on his part not attributable to the employee at all. For the attorney's

error, which was unknown to the employee, the latter was dismissed by the employer on the basis of dishonesty and misrepresentation

contained in the particulars of claim. The dismissal of the employee was upheld by the Commissioner under the aegis of the CCMA.

[3] This application is in terms of section 145 of the LRA and the applicant seeks to review and set aside the arbitration award issued by the first respondent (“the arbitrator/commissioner”).

- [4] The employer opposes this application and contends that the arbitrator committed no gross irregularities and was correct to dismiss the employee as per the arbitration award.

Salient background facts

- [5] The employee (Mr E Tlhaganyane) commenced working for the employer (Assmang Limited-Blackrock Mine) on or around October 2011, as a Shift Supervisor. On 20 July 2017, the employee was served with a notice of suspension premised on allegation that he stole the employer's disciplinary records.
- [6] On 23 August 2017, following an investigation into the theft of the disciplinary records, the employer's investigation established that there was insufficient evidence to attribute the theft of its disciplinary records to the employee. During that period of suspension, the employee was also AMCU's shop steward. Following the outcome of the said investigation, the employee's suspension was duly uplifted.
- [7] Aggrieved by the allegations of theft level against him, on 23 August 2017, the employee lodged a grievance in terms of the employer's grievance policy. The employee asserted in his grievance that he was discriminated against by the employer in alleging that he stole the employer's disciplinary records. However, the employer instituted another investigation that found that the employee was not discriminated against.
- [8] On 26 October 2018, the employee caused the issuance of summons for defamation against the employer through his attorney Mr Nico Van Noordwyk ("the employee's attorney"). In the particulars of claim, it was stated that the employer dismissed the employee on the allegation of theft of the employer's disciplinary records.
- [9] The employer took issue with the word "dismissal" as it only suspended the employee and did not dismiss him. Solely for that reason, the employer charged the employee with dishonesty and misrepresentation of facts contained in the particulars of claim.
- [10] The employer appointed one Mr Radebe, a Human Resources Manager employed by Beeshoek Mine, as chairperson of the internal hearing. Following the internal hearing on 15 April 2019, the employee was dismissed for dishonesty and misrepresentation. The employee instituted the internal appeal and it was unsuccessful.
- [11] On 16 May 2019, AMCU on behalf of the employee referred the dispute to the CCMA. On 9 July 2019, conciliation was held and it failed to resolve the dispute and same was referred for arbitration. The First Respondent was appointed as arbitrator and it is his arbitration award that is sought to be reviewed and set aside by this court.
- [12] After affording the employer and employee to present their respective evidence, the First Respondent found that the dismissal of the employee was substantively and procedurally fair and the sanction of dismissal for dishonesty and misrepresentation was appropriate in the circumstances.

The award

[13] According to the arbitrator's reasoning and conclusion, the employer discharged its onus in proving that on the balance of probabilities the employee's dismissal was substantively and procedurally fair. Further, the arbitrator found that the employee has shown no remorse for his misconduct even at the arbitration proceedings and he had breached the trust relationship with the employer. In the premise, the arbitrator found that the sanction of dismissal was appropriate.

The Applicant's case

[14] The employee contends the arbitration award stands to be reviewed and set aside on the following grounds, namely;

(a) commissioner committed gross irregularities in finding that the employer had the right to discipline the employee due to allegations contained in the summons; (b) commissioner committed gross irregularity when he failed to appreciate the importance of employee's evidence; and (c) commissioner committed gross irregularity in his assessment of the evidence in that he failed to appreciate that it is the employee's attorney who drafted particulars of claim without the involvement of the employee.

[15] According to the employee, the arbitration award in issue is not the one a reasonable arbitrator could have arrived at for the following

reasons:

15.1 The employee breached no rule as summons is a legal document and only the court under which it was issued had jurisdiction to determine its truthfulness of the facts contained therein;

15.2 The arbitrator acting reasonably ought to have found that on facts presented by the employer, the employee did not commit any misconduct that relates to dishonesty or misrepresentation as the summons was prepared by the employee's attorney who made errors;

15.3 The summons was at best vague and embarrassing;

15.4 The arbitrator totally ignored the employee's attorney's evidence and made no adverse credibility findings against the said attorney;

15.5 The employee had referred the employer to his attorney to establish if the attorney was responsible for the errors contained in the particulars of claim; and

15.6 Any arbitrator acting reasonably would have exonerated the employee and duly reinstated him.

- [16] The employee contends that the arbitrator ought to have found that the employee's attorney only received the correspondence that relates to suspension and in error and not being well versed in employment law, made reference to dismissal instead of suspension when he filed and served summons. Further, the employee contends that the evidence of his attorney was not considered by the arbitrator at all.
- [17] The employee testified that when he was confronted with the contents of the particulars of claim by the employer, he referred the employer to his attorney as he had not seen the combined summons (to which the particulars of claim were attached) before it was issued on his behalf by his attorney. The employee further stated that there was no document at his disposal that he furnished to his attorney that made mention of dismissal.
- [18] In sum, the employee asserts that the decision arrived at by the arbitrator is a decision that a reasonable arbitrator would not have arrived at premised on the facts contained in the records of arbitration proceedings.

Third Respondent's case

- [19] The employer's contention is that the arbitrator was correct in law as dishonesty and misrepresentation are serious transgressions which effectively have bearing on the continued employment relationship between the employer and employee.
- [20] Further, it was the employee who was a shop steward that gave his attorney instructions contained in the particulars of claim. For that reason, the attorney acted on the instructions of the employee. In this regard, the employer contends that to state that the employee was dismissed due to the alleged theft of employer's disciplinary records was both dishonest and constituted misrepresentation. With dishonesty and misrepresentation contained in the particulars of claim, the arbitrator was correct to find that the trust relationship was broken down. In the premise, dismissal of the employee was the only appropriate sanction for the arbitrator to have reached.
- [21] In the circumstances, the employer submitted that this review application be dismissed with costs.

Law, Evaluation and

Analysis

- [22] The legal framework for review of arbitration awards is sourced from s 145(2) of the LRA. The test for review has been set out in various authorities[2] and needs no repetition.
- [23] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*[3], the Labour Appeal Court held that "a reviewing court must ascertain whether the commissioner considered the principal issue

before him/her, evaluated the facts presented at the hearing and came to a reasonable conclusion.”

[24] The sole principal issue that needed to be evaluated and determined by the arbitrator in this case had to do with whether the contents of the particulars of claim, specifically in reference to dismissal instead of suspension, was included in the particulars of claim at the instance of the employee. This is a pertinent issue the arbitrator failed to properly apply his mind on.

[25] The arbitrator ignored the evidence placed before him under oath by the employee’s attorney. The employee’s attorney testified that the employee gave him only two documents, being the letter of suspension for the alleged theft of the employee’s disciplinary records and the letter uplifting the said suspension. The employee’s attorney further stated under oath before the arbitrator that he filed and served summons without proper consultation with the employee due to the attorney’s work schedule. It is employee who later alerted his attorney that the content of the particulars of claim in reference to dismissal were

incorrect. This unchallenged evidence is also captured clearly by the arbitrator at paragraph 35 of his award in the following terms:

“35. ...There was no instruction from the applicant about dismissal, but suspension. It was a mistake made by his office.”

[26] Paragraphs 37 and 38 are important and the arbitrator says the following regarding the testimony and cross-examination of the employee’s attorney:

“37 Under cross examination he conceded that he got the information from

the applicant pertaining to particulars of the summons as per doc 66-69. He again conceded that it was an error on his part. That it was a normal human error committed. That it was an oversight and the mistake was not corrected before the dismissal.

38 He does not know labour matters and he did not make a request to assist his client at the hearing. The applicant was represented by the union and they indicated to him there was no need for his testimony. That he accepted that the loss in translation on the summons led to the applicant’s dismissal (sic).”

[27] In capturing the evidence of the employee, the arbitrator said the following at paragraphs 41 and 42:

“41 That he never issued an instruction to sue for dismissal but for suspension. He told the respondent that was not his claims contained in the particulars of the summons. As an AMCU shop steward, he knows that dismissal matters are dealt with at the CCMA.

42 When he consulted with Mr Nico Van Noordwyk he told him that he is not well conversant with labour law, but he initiated the summons against the respondent. His union rep advised him to call his lawyer to come to testify at the hearing and that was on record. He pleaded not guilty to both counts. He testified that he requested the Chairperson to allow his lawyer to testify but that was refused.”

[28] The import of what is contained in the paragraphs cited above demonstrates that the employee placed before the arbitrator material and compelling evidence that was not challenged under cross examination by the employer. Instead of attaching any credence in the employee’s attorney’s evidence, the arbitrator simply ignored to deal with such crucial evidence. What the arbitrator emphasised in his award is that there was no request by the employee to have his attorney testify regarding the contents of the particulars of claim. However, the arbitrator’s finding is not supported by any evidence contained in the record of arbitration proceedings.

[29] Mr Ivan Slater (Mr Slater), the employer’s Production Manager and the initiator on behalf of the employer during the internal disciplinary hearing, testified to the contrary at the arbitration proceedings. In the written submissions drafted on behalf of the employer at the arbitration proceedings, the legal representative of the employer stated the following when dealing with the evidence of Mr Slater at paragraph 6.2:

“6.2. He testified that there was a request by the applicant for the attorney to testify in the disciplinary hearing...”

[30] With the employer’s witness stating that the employee requested to call his attorney to testify, the arbitrator stated the following in his award at paragraph 67:

“67 From the evidence before me the applicant was at pains to argue that he was refused to call his lawyer to testify at the hearing. He presented no tangible evidence to this effect and I am not persuaded that his dismissal was procedurally unfair as well.”

[31] In *Herholdt v Nedbank Ltd*[4] (Congress of SA Trade Unions as amicus curiae) the SCA made it clear that the review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds in Section 145(2)(a) of the LRA. The following was stated:

“For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by s 145 (2)(a)(ii), the

arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable

if it is one that a reasonable arbitrator could not reach on all material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

[32] From the record of arbitration proceedings, I am unable to determine from which planet did the arbitrator obtain these facts he relied upon to find that the dismissal of the employee was substantively fair. Certainly, the facts he relied upon are not traceable in the record. The arbitrator attached weight to the employer's evidence in an instance where the employer could not substantiate the alleged misconduct on the part of the employee.

[33] In *Nedcor Bank Ltd v Frank and Others*[5], the court described dishonesty as follows at para 15:

"Dishonesty entails lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently."

[34] In the Canadian judgment[6], Fraser J had this to say about dishonesty—"Dishonest" is normally used to describe an act where there has to be some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning". In dissecting the word dishonesty, *actus reus* (physical conduct) and *mens rea* (mental element) must be present. The presence of *actus reus* and *mens rea* denotes that a person purposefully acts with an intent to achieve a certain desired outcome for his or her benefit at the detriment of another (victim).

[35] In common parlance, misrepresentation is an untrue statement of fact. It connotes an act of intentionally giving a false or misleading

information to achieve a certain objective detrimental to the recipient (victim). In the law of contract, there can be fraudulent

misrepresentation[7], negligent misrepresentation[8] and innocent misrepresentation[9]. The employee was found guilty of misrepresentation contained in the particulars of claim in that it was stated therein that the employee was dismissed instead of being suspended. Stemming from any form of misrepresentation in law, the employee in this case cannot have committed any misconduct premised on misrepresentation on the facts placed before the arbitrator.

[36] Rule 18 (1) of the Uniform Rules of High Court provides that the particulars of claim shall be signed by an Advocate or an Attorney

with the right of audience to appear at the High Court. Rules 15 of the Magistrate Rules deals with particulars of claim and ordinarily,

an Attorney would be the one who signs them on behalf of his or her client if the client is legally represented. It needs to be

emphasised that particulars of claim are susceptible to amendment[10] before judgment is handed down.

[37] In law, the particulars of claim is signed on behalf of the plaintiff in action proceedings and at all material times it ought to be signed by a legal representative. It would have been different if the employee was unrepresented as in that case, the employer would have a case

against the employee. In *ABSA Bank Ltd v Barinor New Business Venture (Pty) Ltd*[11], the court upheld a point in limine raised by the respondent in a summary judgment on the basis that the attorney who signed the pleadings did not have the right of audience and accordingly, summary judgment was dismissed with costs.

- [38] The arbitrator failed to deal with the unchallenged evidence of both the employee and his attorney and yet no adverse findings on credibility were made against them. It is trite law that a party that fails to challenge under cross-examination, prima facie allegations adverse to it, cannot claim victory but such amounts to conceding defeat[12]. The Constitutional Court approved the same principle in *President of the Republic of South Africa v South African Rugby Football Union*[13] and said:

“If a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.”

- [39] I find it startling that the employer instituted disciplinary charges against the employee premised solely on the contents of the particulars of claim which mistakenly referenced dismissal as opposed to suspension. The employer, had it engaged the employee’s attorney would have established that the impugned contents contained in the particulars of claim were not premised on the employee’s instructions. With that confirmation from the employee’s attorney, the matter would have been concluded without any disciplinary hearing.

- [40] Further, an established cardinal rule in our jurisprudence asserts that “he/she who alleges must prove.” This cardinal rule is followed in various jurisdictions and South Africa is no exception. The rule’s central thrust is that the burden of proof lies with the party that asserts the existence of certain facts whose veracity has to be determined by the presiding officer. Lord Hoffman, in *Re B (Children)*[14], employing arithmetic analogy characterised the burden of proof in the following terms:

“If a legal rule requires a fact to be proved (a ‘fact in issue’), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and

1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened”.
- [41] In the conspectus of what is set out above, I find that the arbitrator conducted himself inconsistent with his duties and he committed gross irregularities as set out above. The arbitrator ought to have found that the employer dismally failed to prove that the employee was responsible for his attorney’s error, let alone, dishonesty or misrepresentation. In any

case, the employee never signed the particulars of claim and cannot be held responsible for the errors committed by his attorney. I say so fortified by what the appeal court said in *George v Fairmead (Pty) Ltd*[15]:

“When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature.”

[42] This application to review and set aside the arbitration award succeeds. The dismissal of the employee was substantively unfair and he has to be reinstated[16].

Conclusion

[43] In sum, I find that the arbitrator committed a reviewable irregularity by making a finding that cannot be sustained on the evidence before him and that his conclusion falls outside of a band of decisions to which a reasonable decision maker could come on the available evidence.

[44] In as much as disciplining employees is an exclusive province of the employers, however, if there is no evidence to support the allegations, there can be no fair reason to dismiss and the dismissal becomes substantively unfair.

[45] It seems to me that the conduct of the employee’s attorney even if it could be lawfully attributed to the employee, is not an act of dishonesty or misrepresentation but could fall in the category of foolishness as per *Fraser J* above.

[46] In this case, having considered the entire record of arbitration proceedings which includes the ruling of the chairperson of the internal hearing, there was not even a shred of evidence that the employee had any intention to allege that he has been dismissed when he was merely suspended.

[47] In the circumstances, I make the following order:

Order

1. The arbitration award issued by the first respondent dated 18 November 2019, under case number NC 1300-19 is hereby reviewed and set aside and it is replaced with an order that the dismissal of Mr E Tlhaganyane was substantively unfair;
2. Mr E Tlhaganyane is hereby reinstated with immediate effect from the date of his dismissal with all the emoluments that existed prior to his dismissal; and
3. There is no order as to costs.

SMANGA SETHENE

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv AL Cook Instructed by: Larry Dave Attorney Inc For the Respondent: Adv M van As Instructed by: Cliffe Dekker Hofmeyr

[1] Mbanjwa v Shoprite Checkers (Pty) Ltd and Others (DA4/11)

[2013] ZALAC 29 (7 November 2013)

[2] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2007 28 ILJ 2405 (CC) at para 110; Herholdt v Nedbank Ltd 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA);

[3] (2014) 35 ILJ 943 (LAC) at para 16

[4] 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA).

[5] (2002) 23 ILJ 1243 (LAC)

[6] Lynch & Co v United States Fidelity & Fidelity & Guaranty Co

[1971] 1 OR 28 at 37, 38, Ont SC. See ABSA Bank Ltd v Austin-Day and Others (PR 158/17) ZALCPE 5 (14 March 2022) at par 15

[7] Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another (201/19) [2020] ZASCA 74 (29 June 2020)

[8] Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A)

[9] RH Christie Christie's Law of Contract in South Africa 7 ed

(2016) 344.

[10] Rule 28 of the Uniform Rules of High Court and Rule 55A of the Magistrates' Court Rules

[11] 2011

(6) SA 225 (WCC)

[12] ABSA Brokers (Pty) Ltd v GN Moshwana NO and Others

(2005) 26 ILJ 1652 (LAC) at para 39

[13] 2000 (1) SA 1 (CC) at para 61

[14]

[2008] UKHL 35 at para 2

[15] 1958 (2) SA 465 (A) and 472A

[16] Austin-Day v ABSA Bank Ltd and Others [2022] 6 BLLR 514 (LAC) at para 46; "It is trite that once it is found that the dismissal was substantively unfair, reinstatement is the primary remedy envisaged by the LRA."

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