

SOUTH AFRICA / JUDGMENT

Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others (JA 65/13) [2014] ZALAC 82; [2015] 4 BLLR 394 (LAC) ; (2015) 36 ILJ 1453 (LAC) (15 December 2014)
[2014] ZALAC 82

COURT

Labour Appeal Court

BEFORE

Waglay, Dlodlo, Setiloane

CASE / FILE NUMBER

JA 65/13

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JA 65/13

DATE: 15 DECEMBER 2014

REPORTABLE

In the matter between:

ANGLO PLATINUM (PTY) LTD

(BAFOKENG RASEMONE MINE).....Appellant

And

PETRUS HERMANUS DE BEER.....First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION.....Second Respondent

COMMISSIONER L.M. MATLALA N.O.....Third Respondent

Heard: 13 November 2014

Delivered: 15 December 2014

Summary: Review of arbitration award – employee dismissed for breaching company’s policy against receiving gifts and favours from suppliers and clients – employee embarking on a hunting trip with an employee of company’s supplier - employee not disclosing favour received from employee’s supplier- Employee disputing any knowledge of the policy – commissioner finding employee guilty of the breach- Labour Court setting aside arbitration award – Appeal – employee having knowledge of the policy against accepting gifts, hospitality and favours from suppliers and knowing that the favour in question fell within the ambit of the policy –employee dishonest – failing by employee to accept any wrongdoing or remorse breaking the employment relationship – commissioner award falling within the band of reasonableness

- Labour Court’s judgment set aside- review application dismissed

CORAM: WAGLAY JP, DLODLO ET SETILOANE AJJA

SETILOANE AJA

[1] Anglo Platinum (“the appellant”) appeals against the judgment of the Labour Court (Bhoola J) in which it set aside on review a CCMA arbitration award in which the commissioner found that the dismissal of Petrus Hermanus De Beer (“the first

respondent”) by the appellant for misconduct was substantively fair.

[2] The first respondent was employed by the appellant at the Bafokeng Rasemone Platinum Mine (“the Mine”) in April 2003 as an engineering overseer in charge of conveyor belts. The mine had appointed Zalsplice as its exclusive conveyor belt supplier. The Zalsplice representative servicing the mine was Mr N Scheepers (“Scheepers”), a friend of the first respondent.

Scheepers would submit quotations to the first respondent for processing. In terms of Zalsplice’s internal policy, Scheepers:

(i) was entitled to make use of his company bakkie within a radius of 200 km of Rustenburg; (ii) had to get permission to undertake private excursions with clients; and (iii) was not entitled to do favours for clients (including transporting clients) without permission from the managing director, Mr R Bamberger.

[3] The appellant had in place a gift and favours policy (“the original policy”), in terms of which employees were obliged,

inter alia, to disclose all gifts received by them in a gift register. On 29 November 2004, the first respondent together with Mr AC Visagie (“Visagie”), an employee at the mine, made a declaration in the gift register that they had each received a T-Shirt from a supplier. On 1 July 2005 a brief, dated 27 June 2005 from Mr M Farren (“Farren”) the mine manager, dealing with “gifts, hospitality and favours” (“the brief”) was emailed to “ZZG Rasimone Everyone”, which is a database of all employees’ email addresses at the mine (‘the ZZG database’). The brief reads as follows:

‘Management wishes to inform you that acceptance of gifts, hospitality or favours of whatever nature has been terminated with immediate effect.

Employees are therefore not allowed to accept any gifts, hospitality or favours from any supplier of goods and services. These include match tickets, hunting trips, lunches, dinners, holiday, or weekend accommodation, goods or services free of charge or at any artificially low price, or any other gift no matter how insignificant it might seem.

The gifts register is no longer in use until the gifts, hospitality or favours policy has been revised.

You are hereby requested to comply with this provision until further notice. Remember, it is not worth losing your job due to ignorance.’

[4] During the period 14 to 16 July 2005, Scheepers and the first respondent went on a hunting trip, together with a group of people, to the Roodewal Farm which is 17 km outside of Rustenburg. Scheepers had invited the first respondent on the trip which was on a “pay-as-you-go” basis (i.e. each member of the hunting party paid his own way). After the first respondent had shot a blou wildebeest during the course of the hunting trip, Scheepers transported it to the first respondent’s home outside

Rustenburg using his company bakkie (with the total distance travelled being 56 km). He did this as a favour to the first respondent, in circumstances where the first respondent had travelled to the farm in his wife’s Toyota Tazz which, it can be accepted, is not ideally suited to carting a blou wildebeest. Scheepers disclosed neither the fact of the hunting trip nor the favour that he had done for the first respondent to his managing director, Bamberger. The first respondent, in turn, also made no disclosure of the favour to the appellant.

[5] On 4 August 2005, Bezuidenhout (one of the first respondent’s supervisors) forwarded the brief to, inter alia, the first respondent under cover of a note which read: “Please note!!!!!!!!!!!!!! Don’t make yourself guilty.” The tracking register reflects the first respondent as having read Bezuidenhout’s email at 13h09 on 4 August 2005 (a minute after it was sent). The first respondent was suspended on 10 August 2005, and charged on 7 September 2005 with various acts of misconduct, including “dishonesty in that [he] accepted and failed to declare hospitality from a supplier in terms of the company policy”. On 14 October 2005, a new “gifts declaration and registration policy” came into operation. On 16 November 2005, and having been found guilty of, inter alia, the dishonesty charge at a disciplinary inquiry, the first respondent was dismissed.

[6] Following his dismissal, the first respondent was afforded an internal appeal inquiry. The minutes of the appeal inquiry reflect

that the first respondent contended that he was of the habit of deleting all emails sent to the ZZG database, and that he only became aware of the brief, on 4 August 2005, when it was sent to him by Bezuidenhout, this being after the hunting trip. On 15 December 2005, the first respondent’s appeal was rejected, and his dismissal upheld. Following his dismissal, the first respondent referred a dispute to the CCMA, which culminated in the arbitration before the commissioner. At

the arbitration, the only issue in dispute was the substantive fairness of the first respondent's dismissal.

[7] Regarding the existence of a rule or standard, the commissioner found on the evidence that the appellant had a policy (referring to the original policy) in place, which prohibited employees from receiving favours from suppliers without prior approval of senior management and required employees who received gifts or favours to declare them, by recording them in the gift register. He found the original policy to be fair and reasonable as it clearly specified the circumstances under which employees may receive gifts and favours from suppliers, and as such prevented the appellant's employees from exposing themselves to situations where they might compromise the appellant's ethics and business standards. Regarding the first respondent's knowledge of the original policy, the commissioner found that the first respondent could reasonably be expected to be aware of it as, despite his denial of knowledge thereof, he did not put into dispute, in cross-examination, the testimonies of Mr K Modisakeng ("Modisakeng"), Mr GL Martin ("Martin") and Visagie respectively, that the original policy had been in existence for a period in excess of five years prior to his dismissal, and that it was communicated to all employees during induction. Similarly, in relation to the first respondent's knowledge of the brief, the commissioner found that, despite the first respondent's denial of having received the brief on 1 July 2005, he could reasonably be expected to have been aware of it prior to the hunting trip, because

he failed to put into dispute, in cross-examination, the testimony of Modisakeng that the brief was emailed to all employees of the mine including to himself; that it was discussed in staff meetings; and that he personally displayed it on noticeboards for the staff to see.

[8] Regarding whether the first respondent contravened the policy, the commissioner found:

'It was common cause that Mr De Beer was invited to a hunting trip by Mr Scheepers a representative of Zalsplce, a supplier of services to the Respondent. De Beer attended the hunting trip on the 17th July 2005, where he shot a wildebeest buck. Mr Scheepers of Zalsplce transported the buck to Mr De Beer's house's (sic) in the company bakkie, and De Beer did not pay for the transport of the buck. Mr Scheepers confirmed that he did Mr De Beer a favour, by transporting the buck in the company bakkie. De Beer did not have the prior approval of a senior management to receive such a favour and he failed to declare the favour he received from Zalsplce. Mr Bamberger testified that he did not give permission for Scheepers to transport De Beer's buck for him in the company bakkie. De Beer dealt with Scheepers regularly in the course of his employment. Scheepers submitted quotations to De Beer, who would obtain orders for business, get the approval of the engineer, and award business to Zalsplce. According to the evidence of the section engineer Mr Ngakane, Zalsplce was the only supplier of conveyor belt parts, and the other two suppliers were kicked out by management. De Beer admitted that he could have influenced management to use Zalsplce as the sole supplier of conveyor belts at Bafokeng Rasemone Mine. The fact that De Beer and Scheepers were friends from school did not nullify the fact that De Beer could have used his position as engineering overseer to influence management's decision to award business to Zalsplce only, and kick out the other contractors.

One of the fiduciary duties of employees in terms of common law contract of employment is to act in good faith and in the employer's best interests. See *Philips v Fieldstone Africa Ltd* (2004) 25 ILJ 1005 (SCA). By acting in a manner that is contrary to his employer's policy, De Beer was in breach of his fiduciary duty. On the balance of probabilities, I find that Mr De Beer contravened a workplace rule

of standard'

Regarding whether dismissal was an appropriate sanction, the commissioner found that the first respondent's acceptance of a favour from a supplier's employee (Scheepers), without prior approval of management and without declaring the favour constituted dishonest conduct for which the sanction of dismissal was appropriate. In the result, the commissioner concluded that the first respondent's dismissal was substantively fair, and upheld his dismissal.

[9] Aggrieved, the first respondent launched an application to review and set aside the award. The thrust of the Labour Court's judgment, which deals with the commissioner's findings that the first respondent contravened the rule, is this:

'However, even if the applicant was found to be aware of the rule, I am in agreement with the applicant's submission that no reasonable arbitrator could have concluded that his conduct constituted breach of such a rule. The only and extremely tenuous link to the supplier was that Scheepers was an employee of the supplier and had used its vehicle, which he was entitled to do over weekends. There was no evidence that Scheepers had at the time been acting in the course and scope of his employment with Zalsplice. Instead, the evidence was that the incident occurred during private social interaction between friends and was entirely unrelated to the employment of either Scheepers or the applicant, or indeed the relationship between the first respondent and its supplier. In fact the evidence was that Zalsplice was already the sole supplier of the relevant products to the mine. There was no evidence of any attempt to influence orders from the mine (or that the applicant had the power to do so) or any money changing hands or any sponsoring or subsidisation of the trip by any party. The evidence of Visagie was that the aim of the gifts policy was to warn employees about the consequences of bribery and corruption. The arbitrator's conclusion that the favour constituted a favour by a "supplier" and as consent had not been obtained and the favour was not declared the applicant was guilty of "acts of dishonesty" constitutes a reviewable irregularity. There was no evidence that the applicant attempted to deceive his employer – instead he co-operated fully with the investigation and did not conceal information. Even if he was aware of the policy there is no reason for him to have considered a favour from a friend to fall within its ambit. There was no evidence whatsoever of dishonesty and the arbitrator's finding to that effect reflects a failure to apply his mind and constitutes a gross irregularity.'

[10] Dealing further with the commissioner's finding of dishonesty, the Labour Court found:

'The arbitrator, let alone failing to apply his mind to the fact of whether the breach of policy (even if the breach had been proved)

constituted “acts of dishonesty”, had no regard to the effect of the dishonesty on the employment relationship. He merely concludes that there is authority for dismissal being an appropriate sanction for dishonesty but fails to determine whether it is appropriate in this instance. This is not a conclusion that could have been reached by a reasonable arbitrator. There was no evidence that the trust relationship had been broken by the applicant’s conduct. The leap of logic was not one a reasonable arbitrator could have made.’

The Labour Court accordingly set aside the commissioner’s award on the basis of it being unreasonable, and substituted it with an order that the first respondent’s dismissal was substantively unfair and that he be reinstated.

[11] The Labour Court, in my view, misapplied the review test as enunciated by the Constitutional Court in *Sidumo* for determining the substantive fairness of a dismissal i.e. “is the decision reached by the commissioner one that a reasonable

decision-maker could not reach?”[1] – as it simply failed to consider whether its finding that the commissioner’s award was unreasonable was, nevertheless,

capable of justification on all the evidence before the commissioner. In *Herholdt*, [2] which endorsed and clarified the operation of the *Sidumo* test, the SCA emphasised that an award of an arbitrator will only be set aside on review if both the reasons and the result are

unreasonable. It held that in determining whether the award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reasoning is found to be unreasonable, the result is, nevertheless, capable of justification on all the material before the arbitrator, including for reasons not considered by the arbitrator. The SCA in *Herholdt* further held that the result of an arbitrator’s award will be unreasonable if it is entirely disconnected with the evidence,

unsupported by any evidence and involves speculation by the arbitrator.[3] It follows from this that an arbitrator’s award will be reasonable when there is a material connection between the evidence and the result, or, put differently, when the result is supported by some evidence. Thus as observed by the SCA:

‘A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the 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.’[4]

[12] Endorsing this view, this Court in *Goldfields*, [5] subsequently rejected the fragmented or piecemeal approach to reviews by highlighting that the Labour Court should not engage in a piecemeal analysis of each of the arbitrator’s findings, because this will “assume the form of an appeal” as opposed to a review. Instead, the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the

evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.[6]

[13] Counsel for the first respondent, at the hearing of the appeal, conceded wisely, in my view, the existence of the appellant's

policy against accepting gifts and favours, and that he was aware of the policy. As in the review application, however, the first

respondent persists in his denial that he contravened the policy by accepting a favour from Scheepers, who though a representative of Zalsplice, a supplier to the mine, was his friend. In support of this denial, the Labour Court found that no reasonable commissioner could have found that the first respondent breached the relevant rule for basically two reasons: firstly because the only link to the supplier (Zalsplice) was that Scheepers was an employee of the supplier and made use of its vehicle (which he was entitled to use), with the whole incident involving a private social interaction between friends, unrelated to the relationship between the company and the supplier; and secondly, because Zalsplice was already a sole supplier to the mine, and there was no evidence of any attempt to influence orders or of any sponsoring/subsidisation of the hunting trip. While the Labour Court was clearly of the view that the commissioner's finding that the first respondent breached a disciplinary rule was erroneous (for the reasons mentioned by it), it failed to consider whether such finding was, nevertheless, capable of justification on all the material before the commissioner, including for reasons not considered by the commissioner. That the Labour Court ought to have done so appears from both Heroldt and Goldfields.

[14] Had the Labour Court undertaken this analysis, it would, in my view, plausibly have found that the commissioner's conclusion that, the first respondent had breached a disciplinary rule was not unreasonable for two reasons: firstly because the first respondent

had been aware of the brief before his hunting trip on 16-17 July 2005, and secondly because the case which he advanced, at the

arbitration hearing, that he had not received the brief on 1 July 2005 because he was left off the ZZG database, was entirely in

conflict with the (spurious) case that he advanced in his appeal inquiry, which was that he was of the habit of deleting all emails

sent to the ZZG database. Modisakeng testified that immediately upon receiving the brief by email, on 1 July 2005, he pinned copies on notice boards around the mine including in the change house and offices. However, the first respondent's version that he had not read the brief because there was no notice board "on [his] way, not even in the change house", was not put to Modisakeng under cross-examination. The rule contained in the brief is explicit: with immediate effect, there was a total ban on all "favours, hospitality and gifts" of whatever nature from any supplier, no matter how insignificant. That the first respondent himself was concerned, and rightly so, that the brief covered the cartage of his buck, is apparent from the lengths that he

went to in attempting to prove that he did not receive the brief until 4 August 2005. Indeed, it was a key part of his defence, that he only saw the brief for the first time after his hunting trip, on 4 August 2005, when Bezuidenhout emailed it to him.

- [15] It was common cause that the cartage of the buck constituted a favour that was undertaken by Zalsplice's representative servicing the mine (Scheepers) using Zalsplice's bakkie. This, in my view, was sufficient to bring it within the broad terms of the prohibitions contained in the brief. What served to strengthen this nexus is that Scheepers, on the version of his managing director (Bamberger), breached Zalsplice's policy by not obtaining permission to go on an hunting trip with the first respondent (an employee of a client) and do the favour in question for him. The friendship between the first respondent and Scheepers did not, as contended for the first respondent, render the total prohibition of favours covered by the brief inapplicable to interactions between them. Therefore, the fact that the Labour Court held a different view, did not render the finding of the commissioner on this aspect unreasonable.
- [16] I am of the view that it was not necessary, as found by the Labour Court, to demonstrate for purposes of establishing a breach of the prohibitions contained in the brief that, the first respondent could necessarily influence the awarding of work to Zalsplice. It was sufficient that the first respondent, by his own admission, gave input into such decisions, and that Scheepers interacted with him over quotations and did not know how the approval process worked. It was equally unnecessary, for purposes of establishing a breach of the prohibition, to establish, as found by the Labour Court, that Scheepers sought to influence orders, or that Zalsplice paid in any way for the hunting trip. In the circumstances, I consider the commissioner's finding that the first respondent was guilty of having breached the prohibition against accepting favours, contained in the brief, to be reasonable.
- [17] The Labour Court found the commissioner's finding on dishonesty and dismissal to be unreasonable because there was no deception on the part of the first respondent and there was no reason for him to have considered a favour from a friend as falling within the ambit of the prohibition. In addition, the Labour Court found that there was no evidence of dishonesty, and even if the first respondent was dishonest, the commissioner did not consider its impact on the employment relationship. Nor did he consider whether dismissal was appropriate in the circumstances; instead he merely concluded that there is authority for dishonesty warranting dismissal. Again, it is clear that the Labour Court disagreed with the commissioner, but it once again failed to consider whether the commissioner's finding, that the sanction of dismissal was appropriate, was capable of justification on the totality of the evidence before him. If the Labour Court had undertaken this analysis, it would, plausibly, have come to the conclusion that the commissioner's decision on sanction was not unreasonable – because once it is accepted that the first respondent's version, that he was not aware of the brief until 4 August 2005, was contrived, and that he was aware that the prohibition covered the cartage of his buck, this leaves the first respondent without a reasonable explanation for failing to comply with the prohibition at the time of the hunting

trip, and failing to disclose the favour afterwards. Seen thus, it can reasonably be inferred that the first respondent purposefully did not comply with the brief or purposefully did not disclose the favour afterwards and therefore acted deviously and with deception (dishonestly[7]).

- [18] The brief makes it clear that a breach of the prohibition would result in dismissal. Bezuidenhout's covering note, of 4 August 2005, which reads "Please note!!!!!!!!!!!!!! Don't make yourselves guilty", is consistent with this. Thus on the basis of the zero-tolerance policy of the appellant in relation to the acceptance of gifts, favours and hospitality from clients and suppliers, even if the first respondent was not dishonest, his dismissal would, nevertheless, be sustainable.
- [19] Turning then to the Labour Court's findings regarding dishonesty, I consider it to have erred in finding that there was no deception on the first respondent's part because he co-operated fully with the investigation and that there was no reason for him to have considered a favour from a friend as falling within the ambit of the prohibition. The appellant had, in this regard, succeeded in proving that the first respondent knew full well that the favour in question fell within the ambit of the brief – it being for this reason that he was anxious to establish, at the arbitration hearing, that he had not received the brief before the hunting trip – when it was clear, on the objective facts, that he had received the brief on 1 July 2005 and, accordingly, had full knowledge of the total prohibition against accepting gifts, hospitality and favours from suppliers before the hunting trip. Although the only plausible inference to be drawn from these proved facts is that the first respondent was dishonest, the Labour Court simply failed to comprehend this. Regarding the findings by the Labour Court on sanction, it is implicit in the commissioner's findings that in view of the nature of the offence, which involved deception and dishonesty and, in particular, the failure of the first respondent to demonstrate any acceptance of wrongdoing or remorse, he considered the employment relationship to be destroyed[8] and dismissal an appropriate sanction. Indeed, the commissioner determined sanction under the heading: "whether dismissal was an appropriate sanction". The Labour Court accordingly erred in finding that the commissioner failed to consider whether dismissal was appropriate in the circumstances of this matter.
- [20] The commissioner's decision that the first respondent's dismissal was substantively fair, to my mind, clearly passes the test for reasonableness as it is supported by the evidence, and falls within a range of reasonable responses to the first respondent's

misconduct. I am unable, in the circumstances, to find that the commissioner's decision was one that a reasonable decision-maker could not make. For these reasons, I consider the Labour Court to have erred in reviewing and setting aside the award of the commissioner on the basis that the outcome was unreasonable. The appeal must accordingly be upheld. I consider this to be a matter in which there should be no costs order.

- [21] In the result, I make the following order:

- (1) The appeal is upheld with no order as to costs.
- (2) The order of the Labour Court in the review application is set aside and replaced with the following order:

“the review application is dismissed with costs.”

F Kathree-Setiloane

I agree

Waglay JP

Dlodlo

APPEARANCES:

FOR THE APPELLANT: Adv A Myburgh SC

Instructed by Edward Nathan Sonnenbergs

FOR THE FIRST RESPONDENT: Adv G Fourie

Instructed by Howes Inc Attorneys

[1] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] 12 BLLR 1097 (CC) at para 110.

[2] Herholdt v Nedbank Ltd (COSATU as amicus curiae)

[2013] 11 BLLR 1074 (SCA).

[3] Herholdt at paras 12 and 13.

[4] Herholdt at para 25.

[5] Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others

[2007] ZALC 66; [2014] 1 BLLR 20 (LAC).

[6] Goldfields at paras 18-21.

[7] Nedcor Bank Ltd v Frank and Others

[2002] 7 BLLR 600 (LAC) at para 16: ‘Dishonesty entails lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently ...’ As found in Theewaterkloof Municipality v Sa Local Government Bargaining Council (Western Cape Division) and Others

(2010) 31 ILJ 2475 (LC) at para 21, there are different forms and shades of dishonesty.

[8] Insofar as the requirement to lead evidence to establish a breakdown in the employment relationship is concerned, Edcon Ltd v Pillemer NO and Others

[2010] 1 BLLR 1 (SCA) turned on its own facts, and was not the law when the commissioner's award in this dispute was handed down.

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