

SOUTH AFRICA / JUDGMENT

Booysendal Platinum Proprietary Limited v Commission for Conciliation, Mediation (JR2326/21) [2024] ZALCJHB 259 (11 July 2024)

[2024] ZALCJHB 259

COURT

Labour Court Johannesburg

BEFORE

R.T. Maddern

CASE / FILE NUMBER

JR2326/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR 2326/21

In

the matter between:

BOOYSENDAL
PLATINUM PROPRIETARY LIMITED
Applicant
and
THE
COMMISSION FOR CONCILIATION, MEDIATION
AND
ARBITRATION
First Respondent
COMMISSIONER GERALDINE
KHOZA N.O.
Second Respondent
KHOPOLO
PETER LETELE
Third Respondent

Heard:

26 June 2024

Delivered:

11 July 2024

JUDGMENT

MADDERN, AJ

Introduction

- [1] This a review application in terms of section 145 of the Labour Relations Act[1] (the LRA) for an order reviewing and setting aside of the arbitration award dated 10 October 2021 issued by the Second Respondent, the Commissioner, in terms of which the Second Respondent determined that the dismissal of the Third Respondent, Mr Khopolo Peter Letele was substantively unfair and in terms of which the Third Respondent was retrospectively reinstated with backpay from the date of his dismissal and was to be issued with a written warning valid for six months from the date of reinstatement.
- [2] The Third Respondent chose to represent himself and opposes the application.

Background

Facts

- [3] The Applicant is a conductor of Platinum Mining Operations, and the Third Respondent was employed as a mine overseer at its Booyseendal

Platinum Mine.

- [4] The Applicant conducts its operations within a highly regulated industry and within such industry the Third Respondent as the mine

overseer was employed in a senior role that carried with it the responsibly and accountability for amongst other things, workplace

safety in relation to those areas of the mine for which the Third Respondent was responsible.

- [5] The Third Respondent was given notice of a disciplinary enquiry[2] which notice required the employee to address allegations of misconduct which were outlined in the notice as follows:

“Misconduct

1. Dishonesty
2. Nature of Misconduct – Breach of employee’s duty of good faith. See attached statement. The attached statement[3] provided as follows:

During G-sheet meeting of 2 March 2021, rock engineering department reported missing support on line 20 of BS2 STR 01 SI, which were required to be installed.

During the G-sheet meeting of 15 April 2021, which was the first G-sheet meeting since the meeting of 2 March 2021, I made a follow up on the above action, Mr Peter Letele reported that the support requirement mentioned above was closed out, meaning the missing support was installed. The rock engineering department tried to advise Mr Letele that the support was not installed as he was reporting, however, Mr Letele insisted that the support was installed.

I therefore requested Mr Azwindini Makungo to go underground to verify if the missing support was installed. The findings of the follow up underground inspection report BSU2-strike 01 south G-sheet closeout, of 22 March 2021 showed that the requirement was not closed out.”

[6] Following the disciplinary hearing, the Applicant was dismissed and although the Third Respondent appealed, the dismissal was upheld

whereafter the Third Respondent referred a dispute relating to his alleged unfair dismissal to the First Respondent.

[7] The arbitration was conducted by the Second Respondent as the Commissioner on 6 July and 20 September 2021 and an award was then

rendered by the Second Respondent on 10 October 2021.

[8] In summarized terms it was the Applicant’s contention that the Third Respondent had been dishonest when he indicated that he had addressed a deviation that had been reported to him on 2 March 2021, in circumstances where the Third Respondent had not done so. The Applicant contends that the Third Respondent had failed to ensure that certain bolts and boards that provide support to prevent a fall of ground had been installed.

[9] Whilst the Third Respondent confirmed that he was aware of the deviation as reported to him on 2 March 2021[4], the Third Respondent contended that:

“my case is that the issue of the missing support was addressed, however there was new brought to the attention of the mine overseer that there is a P vein in existence in that area[5]”.

[10] The summarized and simplified version of the Third Respondent during the course of the arbitration was that whilst he acknowledged that the deviation of 2 March 2021 had been brought to his attention and was his responsibility, this deviation had been “closed out” and the deviation which was raised on 15 April 2021 constituted a new deviation in that it related to a P vein which was not the initial deviation which was reported to him on 2 March 2021.

Grounds of Review

[11] The Applicant contends that the Award of the Second Respondent is reviewable on the basis that the Commissioner committed a gross

irregularity in the conducting of the proceedings by misconstruing the facts and issues and, committed a gross irregularity in awarding the Third Respondent reinstatement and backpay in circumstances where the evidence indicated that the Third Respondent was at fault and was dishonest, and a supplemented third and fourth ground, in terms of which the Commissioner

committed a gross irregularity in failing to attach the appropriate weight to the evidence regarding the severity of the misconduct and committed a gross irregularity in failing to identify that the Third Respondent changed his versions on pertinent aspects of the dispute.

[12] The Third Respondent contends that the application for review has “no merit and there is no hope that a reasonable Commissioner could have made a finding different from the one made by the Second

Respondent”[6].

Evaluation

[13] At first glance, the grounds of review appear, at least, in the main, to relate to a so-called “penalty” review. The Third Respondent was found guilty of misconduct formulated as dishonesty and dismissed and the Second Respondent determined that dismissal was an inappropriate sanction, awarded reinstatement and backpay whilst imposing a final written warning.

[14] On closer scrutiny however, it is apparent that the Second Respondent reached a finding that the Second Respondent had committed misconduct in the form of conduct which the Second Respondent found to have been “reckless on his part and almost tantamount to dereliction of duties”[7].

[15] In the Second Respondent’s award, the Second Respondent in the analysis of the evidence and argument, and after finding that the dismissal of the Third Respondent was substantively unfair, records in the reasons provided in the award[8]:

“43.2 What is in dispute is whether or not the deviation in question emanated from the one discussed on 02 March 2021 in a G sheet meeting. It then becomes important to look at the wording of the deviation as reflected in the minutes of the meetings on both dates. On 02 March 2021 it reads thus: “10.01 SL: L20: install missing support”. On 15 April 2021 it reads thus: “9. 01 SL: 20: install 3 resin bolts missing to support the P vein.

43.3 At face value, the two deviations appear to be different, however given the explanation of how coaching gets done it is reasonable to expect the Applicant to have understood the extent of the deviation that the latter wording was included in the earlier wording of 02 March 2021. This is after the Applicant did not dispute the fact that a deviation is discussed with the mining team and posted on the notice board as well. The deviation as issued specifically mentions the latter wording. Ignorance by the Applicant cannot be a valid excuse in the circumstances.

43.4 Having said the above, I however do not understand why the matter could not have been taken as a new deviation in the meeting of the 15th and that it should be corrected and closed off in the next meeting. Instead, an investigation is instigated, almost as if the intention to have the deviation not resolved by the next meeting. It is not clear why neither party to the investigation deemed it necessary to conduct a joint inspection as in my view, the only objective was or should have been to have the deviation resolved rather than catching the Applicant out. It is unfortunate

that the objective seems to have been catching the Applicant out. This is supported by the issue of the permission or lack thereof to take photos underground ...

43.5 In conclusion it is disappointing that the Applicant as well failed to address the issue between 15 April 2021 and 26 April 2021 when the report was issued. I find this to have been reckless on his part and almost tantamount to dereliction of duties. I am stating this having in mind that the Applicant was not responsible for the physical correction of the deviation but rather that he failed to manage the issue with his subordinates in a responsible manner, when he had the time to do so. This to me indicates that the Applicant is also coming with hands not so clean.

43.6 This brings me to the issue of the appropriateness of dismissal as a sanction. In view of the argument above, I am inclined to submit that the charges were an overkill, and that dismissal was too harsh a sanction in the circumstances. The matter could have been handled differently and an alternatively sanction could have been affected. I am also not convinced that the trust relationship has been destroyed, furthermore, no evidence was led by the Respondent in this regard.”

[16] At the heart of any determination by the Second Respondent as to whether the dismissal of the Third Respondent was fair, is the

assessment of the evidence in relation to deviation which had been raised on 2 March 2021 and which formed the subject of the dispute

between the parties at the meeting of 15 April 2021 after which the rock engineering department was tasked with determining whether the deviation had, as the Third Respondent contended, been attended to. In this regard, if the deviation had been “closed out”, then the Third Respondent had not been dishonest in contending that it had.

[17] The Second Respondent dealt specifically with the Third Respondent’s contention that what was observed in the area in question of the underground workings on 15 April 2021 by the rock engineering department, constituted a new deviation, and finds:

“At face value, the two deviations appear to be different ... it is reasonable to expect the Applicant to have understood the extent of the deviation that the latter wording was included in the earlier wording of the 2nd of March 2021 Ignorance by the Applicant cannot be a valid excuse in the circumstances.”[9]

[18] Having reached a conclusion, which in effect negated the Third Respondent’s defence as to a new deviation, the Second Respondent failed, unreasonably so, to appreciate that given the absence of any defence as to ignorance, the Third Respondent having acknowledged that he knew of the initial deviation of 2 March 2021, had not attended to it. This much is evident from the Second Respondent’s conclusion that:

“It is disappointing that the Applicant as well failed to address the issue between 15 April 2021 and 26 April 2021 when the report was issued. I find this to have been reckless on his part and almost tantamount to dereliction of duties.”[10]

- [19] On the evidence, there was no dispute between the parties that the Third Respondent had in the meeting of 15 April 2021, expressly confirmed that the deviation which formed the subject of the discussion had been “closed out”.[11]
- [20] Given the ambit of the misconduct which the Applicant contended had been committed by the Third Respondent, the only element which then remain for the Second Respondent to determine in regard to the evidence, was the issue of whether the Third Respondent had been dishonest. In this regard, the Third Respondent contended that the deviation had been closed out whilst the investigation by the rock engineering department on 22 April 2021 determined that it had not[12].
- [21] It is apparent from the Second Respondent’s award that the Second Respondent found that the Third Respondent had been “reckless” and his conduct “almost tantamount to dereliction of duties”[13].
- [22] For this reason it is evident that the Second Respondent felt constrained to impose some sanction and then proceeded to do so in the form of “a written warning valid for 6 months from the date of reinstatement”[14].
- [23] In *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*[15], the Constitutional Court confirmed:
- “A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all the relevant circumstances.”[16]*
- [24] The Second Respondent instead of staying within her remit as expressed in *Sidumo*, went off on a tangent and, in so doing, reaches findings in relation to misconduct which did not form the basis of the charges of misconduct for which the Third Respondent was dismissed.
- [25] That the Second Respondent deviated from her remit is further evident from the Second Respondent’s expression of what the Applicant should have done at the meeting of 15 April 2021 – “I however do not understand why the matter could not have been taken as a new deviation in the meeting of the 15th ...”[17] and, the deviation from the remit is further demonstrated by the Second Respondent expressing the preference for a “joint inspection”[18] as opposed the one concluded by the rock engineering department only.
- [26] The Second Respondent having departed from her remit reached the conclusion that:

“I am inclined to submit that the charges were an overkill ... the matter could have been handled differently and an alternative sanction could have been effected. I am also not convinced that the trust relationship has been destroyed ...”[19].

- [27] The finding as to “overkill” in relation to the misconduct, clearly stems from the Second Respondent’s conclusion that the Third Respondent had committed misconduct in the form of a “dereliction of duty” and had proceeded with “dirty hands”. In other words, the Third Respondent was guilty of some misconduct but not that complained of.
- [28] The Second Respondent found that the deviation had been brought to the Third Respondent’s attention. The Third Respondent knew about the deviation and there was no dispute that the Third Respondent had said that he had “closed it out”.
- [29] The Labour Appeal Court has deemed it appropriate to revisit and restate the law in relation to the review test to be applied by this court in *Makuleni v Standard Bank of South Africa Ltd* and others [20]. In dealing with the questions which arise in the final analysis of a review by the court, Sutherland JA emphasized:

“Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to fine determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.”

- [30] It is quite evident that the Second Respondent asked the wrong question and in so doing diverted from “the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination”. The question raised for the Second Respondent to determine was whether the dismissal of the Third Respondent for dishonesty was fair. This, in the context of the critical safety considerations which apply to underground mining environments which pose the ultimate risk to life of the Applicant’s employees. That determination was not made by the Second Respondent and, as a consequence, there has been no fair trial of the core issue and the Second Respondent’s award falls to be set aside on that basis.
- [31] Whilst the misconception of the inquiry renders the award of the Second Respondent reviewable on that ground alone, if regard is had to the result, the Second Respondent, after the tangential inquiry conducted, reached the finding that the Second Respondent had committed a dereliction of duty for which a final written warning was appropriate. This was shockingly inappropriate.[21] On the facts, the Third Respondent was a very senior employee, holding the position of a mine overseer and the dereliction of duty

related to the failure to ensure that a deviation which is specifically designed as a safety measure to address the possible fall of ground, was not attended to. As expressed by this court in *Sasol Mining (Pty) Ltd v Commission for Conciliation, Mediation, Arbitration and Others*[22]:

“... Safety of employees at the workplace is paramount. It cannot be compromised ... Procedures which are intended to prevent injury and fatality particularly in the mining industry need to be complied with properly because a lapse has disastrous consequences.”

[32] On all the facts and circumstances before the Second Respondent, a final written warning is not a decision that a reasonable decisionmaker could reach.

[33] In relation to the costs, after carefully considering the requirements of law and fairness, no order to costs need to be made.

[34] In the premises, the following order is made:

Order

1. The Second Respondent's award of 10 October 2021 is reviewed and set aside.
2. The dispute is referred back to the First Respondent for determination de novo before a commissioner other than the Second Respondent.
3. There is no order to costs.

R.T. Maddern

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant

Advocate V. Mndebele

Instructed by

Webber Wentzel

For the third respondent Peter Letele

[1] Act 66 of 1995 (as amended).

[2] Record at p. 363.

[3] Record at p. 365.

[4] Record at p. 85., lines 24 to 25 and at p. 25., lines 1 to 6.

[5] Record at p. 206., lines 8 to 13.

[6] Pleadings Bundle at p. 49.

[7] Record at p. 17., award at para 43.5.

[8] Record at p. 17. at para 43.1 to 43.6.

[9] Pleadings Bundle, arbitration award at p. 17. at para 43.3.

- [10] Pleadings Bundle, arbitration award at p. 17. at para 43.5.
- [11] Record at p.38., lines 3 to 11, p. 39. “Mr Makungo: The Applicant in the meeting said my statement is not correct, the support is done, everything is complete, there is nothing missing in that hole one, which is 01 S1 line 20; Mr Maripane: Did you have any problem with that? Mr Makungo: He did not show me any proof; Mr Maripane: Then what happened thereafter? Mr Makungo: The mine manager, because he was in the presence during the meeting, he instructed me that I need to go to the section and do close outs so that he can be satisfied, because what I am saying and what the Applicant is saying is two different things, so I was instructed to visit the section and close outs in the form of a formal report.”
- [12] Record, p. 372.
- [13] Pleadings Bundle, award at p. 17. at para 43.5.
- [14] Pleadings Bundle, award at p. 18. at para 4.
- [15] [2007] 12 BLLR 1097 (CC).
- [16] Sidumo supra at para 78 to 79.
- [17] Pleadings Bundle, award at p. 17. at para 43.4.
- [18] Pleadings Bundle, award at p. 17. at para 43.4.
- [19] Pleadings Bundle, award at p. 17. at para 43.6.
- [20] [2023] 4 BLLR 283 (LAC) at para 22.
- [21] Referring to Toyota South Africa Motors (Pty) Ltd v Radebe and Others [2000] 3 BLLR 243 (LAC) at para 53.
- [22] (2005) 36 ILJ 2359 (LC) at para 6.

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