

SOUTH AFRICA / JUDGMENT

Mabasa v Commission for Conciliation, Mediation and Arbitration and Others (JR2187/19) [2021] ZALCJHB 451 (17 December 2021)

[2021] ZALCJHB 451**COURT**

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

JR2187/19

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Source record**THE****LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case****no: JR2187/19****In****the matter between:**

KENNETH
MABASA Applicant
and
COMMISSION
FOR CONCILIATION
MEDIATION
AND ARBITRATION (CCMA) First
Respondent
PATRICK
MBATSANA Second
Respondent
SISHEN
IRON ORE COMPANY (PTY) LTD
T/A
KOLAMELA
MINE Third
Respondent
Heard: 27
October 20201 (virtual proceedings)

Delivered: This

judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 17 December 2021.

Summary: Review

of application – precautionary suspension may be necessitated by the circumstances – procedural fairness is founded in audi

ulteram partem rule and

nothing else – Misrepresentation is a serious offence which goes to the core of the employment relationship.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] This is a review application in terms of section 145 of the Labour Relations Act[1] (LRA). The applicant impugns the arbitration award issued by the second respondent (Commissioner), under the auspices of the first respondent (CCMA) under case number GAWT3621-19, dated 20 August 2019. The Commissioner found the precautionary suspension and dismissal of the applicant substantively and procedurally fair.
- [2] The applicant's impugn is hinged on several grounds of review which mainly question the reasonableness of the arbitrating award. The third respondent is supporting the award.

Background

- [3] The applicant was employed by the third respondent as a Mine Manager effective from 12 March 2018. On 26 November 2018, the applicant and his colleague, Mr Sipho Mathonsi (Mr Mathonsi), the Manager Engineering, were placed on special leave following their differences. They were referred to the third respondent's psychologist to assist them to resolve their differences. The arrangement was that they would both return to work on 3 December
2018. Instead, the applicant was instructed to attend a meeting that was schedule to take place on 4 December 2018 at the third respondent's head office.
- [4] Indeed, on 4 December 2018, the applicant attended the meeting with Mr Strange, the Chief Operations Officer (COO) and the Executive Head of HR, Ms Virginia Tyobeka (Ms Tyobeka). It was in that meeting that he was informed about the anonymous whistle blower who had alerted the third respondent of the circumstances under which the applicant left his previous employer, Lanxess Chrome Mine (Lanxess). The applicant was requested to consent to an investigation into his conduct at Lanxess. According to the third respondent,

the applicant flatly refused to give consent. The applicant, on the other hand, asserts that he refused to give a blanket consent. Nonetheless, he, welcomed, the investigation.

- [5] On 10 December 2018, the applicant was issued with a letter of precautionary suspension which was retracted when he protested about failure to give him an opportunity to make representations against his precautionary suspension. He was then given an hour to make representations but sought an indulgence for more time, which was granted. On 12 December 2018, he submitted his representations opposing the precautionary suspension.
- [6] On 13 December 2018 the applicant was placed on precautionary suspension with full pay, pending the investigation alleged dishonest following an anonymous tip-off. Disgruntled with his precautionary suspension, he referred a dispute to the CCMA under case number GATW1054-19.
- [7] On 21 January 2019, the applicant was served with a notice to attend a disciplinary enquiry that was scheduled for 25 January 2019. He was charged as follows:

‘Dishonesty under Code 3.2 of the company dishonesty code and procedure – Non-disclosure or misrepresentation of relevant information.

Particular allegations

- a) You knowingly failed to disclose the important information during the interview process in February 2018 that could have been useful in the employment decision making. When confronted by senior organisational management in the organisation, he further refused to grant permission for the confirmation of the issues raised in a company Tip-off channel, wherein serious allegations were revealed thus raising suspicions that you were deliberately concealing such critical information.
- b) The nature of the allegations made against you in the tip-off anonymous channel are of serious nature, as they involve criminal investigations by state agents and they allegedly amount to acts of fraud and corruption.’[2]
- [8] On 11 February 2019, the applicant was found guilty as charged and issued with a final written warning valid for 12 months. The third respondent appealed the sanction issued by the chairperson in terms of clause 11 of the Disciplinary Code and Procedure. The applicant also lodged a cross appeal against the findings and the sanction. The applicant’s cross appeal was dismissed. While the respondent’s appeal was upheld and the sanction of a final written warning was replaced with a dismissal. The applicant was summarily dismissed on 20 February 2019.

[9] The applicant referred an unfair dismissal dispute to the CCMA under case number GATW3621-19. The unfair labour practice case under GATW1054-19 was consolidated with the dismissal case and both were arbitrated under case number GATW3621-19. The Commissioner found the applicant's precautionary suspension and subsequent dismissal procedurally and substantively fair. He accordingly dismissed both claims hence these proceedings.

Review test

[10] The review test is trite.[3] As set out in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*, [4] this Court is enjoined not to blur the line between appeals and reviews. It was pertinently stated that:

'...there may well be a fine line between a review and an appeal, in particular, where, as I will show later in this judgment, the reviewing court considers the reasons given by a tribunal, not to determine whether the result is correct, but to determine whether a gross irregularity occurred in the proceedings. At times it may be difficult to draw the line. There is however a clear line. And this line must be maintained. The drafters of the LRA were mindful of the distinction between review and appeal and they wanted this distinction to be maintained. What they sought to introduce was "a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissals." [5] (Emphasis added)

Precautionary Suspension

[11] The applicant's main qualm about his precautionary suspension is that he was only afforded an opportunity to make representations

after his protest. In essence, he contends the third respondent failed to apply its mind to his representations against his precautionary suspension as it had already made its decision. The Commissioner hinged his findings on the Constitutional Court decision in *Long v South African Breweries (Pty) Ltd and Others*, [6] where the following was stated:

'[24] In respect of the merits, the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one... Consequently, the requirements relating to fair disciplinary action under the LRA cannot find application. Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.

[25] In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee. The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted. Generally where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court's finding that the suspension was precautionary and did

not materially prejudice the applicant, even if

there was no opportunity for pre-suspension representations, is sound.’ (Emphasis added)

[12] Based on the above authority, the finding of the Commissioner that the applicant’s precautionary suspension was substantively and procedurally fair cannot be faulted.

Procedural fairness

[13] The applicant impugns the decision of the third respondent to appeal the sanction of a final written warning. At heart in this regard is whether clause 11(b) of the Disciplinary Code and Procedure was already in operation when it was invoked. Clause 11(b) provides that:

‘If the ruling and/or imposed sanction is not in accordance with the Disciplinary Code and Procedure, company instruction or any other company guidelines/directives or the company values the employee will be invited to make representations why the ruling and/or sanction should not be considered afresh by an appeal chairperson appointed by the company.’ [7]

[14] The applicant asserts that the clause 11(b) had not been implemented when he was charged and issued with a written warning. As such, the third respondent had no authority to appeal the lenient sanction. On the other hand, the respondent led evidence to show that the code had already been implemented save for the portion that had to do with the trade union’s concerns about the Reduced to Document (RTD) Disciplinary Enquiry which was suspended pending training. The minutes of the meeting between the union and management on 04 October 2018 supports this assertion.[8] Even though the witnesses of the applicant, who were shop stewards at that time, disputed the respondent’s understanding of the minutes, they did not challenge the fact that this meeting did take place and the accuracy of the contents thereof was never challenged.

[15] It would seem that the effective date was 01 May 2018.[9] On 18 April 2019, the General Manager, Mr Masala Mutangwa, signed an information brief that was communicating the new changes in the revised Disciplinary Code and Procedure. It is instructive that clause 11(b) is not mentioned in this communiqué; but, inter alia, clause 9.1, which deals with RTD, was specifically mentioned. Contrary to applicant’s contention, this communiqué does not assist his case.

[16] Nothing much turns on the chairperson’s refusal to recuse himself or appoint co-opt chairperson. The applicant failed to lead any evidence during arbitration on these issues. It is also strange that the applicant persist with this impugn despite of the fact that the chairperson issued a lenient sanction.

[17] Lastly, there is no evidence that the appeal chairperson exceeded his powers by substituting the sanction of a final writing warning with one of dismissal. The Disciplinary Code and Procedure clearly state that dishonesty is a dismissible offence. The third respondent accordingly availed itself to its right to appeal a sanction that was out of sync with the Disciplinary Code and Procedure in terms of clause 11(b) thereof.

[18] Procedural fairness is founded in audi ulteram partem rule and nothing else. In the overall, the applicant had been afforded a right to be heard as contemplated in item 4 of the Code of Good Practice: Dismissal[10] and in line the authorities of this Court[11] and superior courts. Likewise, the Commissioner's findings in this regard are sport on.

Substantive fairness

- [19] The applicant seems to muddle the issue in question in this regard. The applicant concedes that, at the time he resigned his employment with Lanxess, he had already been suspended and served with a charge sheet on with serious allegations of misconduct. Instead of attending the disciplinary enquiry to defend himself, he chose to quit. That information was very critical when it comes to the third respondent's decision to appoint the applicant.
- [20] The applicant conceded during arbitration that Mr Mutungwa did pose a question about the reason that led him to leave Lanxess; to which he retorted by stating that he had not been supported during his MBA studies and the relationship breakdown with his supervisor. He was, nonetheless, tight-lipped about the fact that at the time of his resignation, was on in suspension and had already been charged with serious allegations which included fraud and corruption.
- [21] It is immaterial whether he was found guilty or not by Lanxess. The crux of the matter is that, as reasonably found by the Commissioner, he deliberately concealed the information about the circumstances that led to his resignation. That information was material and the respondent was prejudiced by the nondisclosure.
- [22] Even when the cat was out of the bag about his deceitfulness, still the applicant was not upfront with third respondent about the circumstances that prevailed when he resigned from Lanxess. He even refused to consent to the investigation as requested by the third respondent. Mr Jacobus Britz (Mr Britz), the investigation officer from Lanxess, confirmed in his testimony that the applicant was suspended and charged, inter alia, with allegations of dishonesty, corruption and bringing the company into disrepute. This evidence was not disputed.
- [23] It is well accepted that dishonesty goes to the core of the employment relationship, which is trust. In *Impala Platinum Ltd v Jansen and others*, [12] dealing with the issue of appropriateness of sanction of dismissal in instances where the transgression is serious, the LAC, per JP Waglay, stated the following:

[19] As held in *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and others*, an "employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer.[13] The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been

found to be fair where continued employment is intolerable and dismissal is "a sensible operational response to risk management" In a recent and as yet to be reported judgment of *Schwartz v Sasol Polymers and others*, this Court dealt with the case of an employee found guilty of conflict of interest in that his wife had received gifts from several

of his employer's service providers. Unlike in this matter, the commissioner there found the employee's dismissal to be substantively

unfair. In setting aside the award, this Court (upholding the Labour Court judgment on substantive fairness) held that the dishonest

nature of the employee's misconduct was of such a nature as to make continued employment intolerable. It further held that it would be fundamentally unfair and unjust to expect an employer to retain in its workplace a senior employee who has shown himself to be guilty of dishonesty. The court also took the view that if the employee was remorseful, the nature of the dishonesty was such that these mitigating factors could not help in mitigating the harsh sanction of dismissal. In this respect, the court held that:

"While I agree . . . that the lack of remorse shown by appellant is relevant, even if genuine remorse had been shown by him, this would only have been a factor to be considered in his favour in determining sanction and would not have barred his dismissal, remorseful or not, having regard to the seriousness of the misconduct committed."

[20] The commissioner rightly found that Jansen's conduct went to the root of the employment relationship deserving of the severest sanction. This cannot be faulted. In fact, it would be unfair to expect the appellant to retain Jansen in its employ where Jansen had not only displayed gross misconduct in failing to comply with statutory regulations but also contravened the duty to act in good faith by promoting his wife's business to appellant's service providers thereby compromising fairness and honesty within the appellant's business relationships. In the circumstances, there was no need to lead any evidence of a breakdown in the relationship, as it was obviously the case. This ground of appeal thus succeeds.' (Emphasis added and footnotes omitted)

[24] Similarly, in the present case, it would be profoundly unfair and unjust to expect the third respondent to retain the applicant in its employ, a senior manager who has shown himself to be guilty of dishonesty.[14] As stated in *Galesitoe v Commission for Conciliation, Mediation and Arbitration and Others*,[15] referred to by the respondent, '...it was not unreasonable to infer that a person applying for the senior level of post in question would have realised that the nature of his relationship with his former employer was a material consideration for his prospective new employer and could affect his employment prospects...'

[25] I have no doubt that the applicant was not candid with first respondent nor remorseful. It follows that the findings of the Commissioner in this regard are also beyond reproach.

[26] The applicant's foul cry about the fact that the Commissioner suspended the arbitration proceedings to assist the parties through mediation is really was clutching at straws. He was legally represented during arbitration and if there was anything untoward in the manner the Commissioner conducted the mediation, his legal representative could have taken it up immediately. Even so, as correctly contended by the third respondent, the award is based on evidence that was before the Commissioner.

Conclusion

[27] Overall, the conduct of the applicant was against the interests of the third respondent and detrimental to the trust relationship, a core element of an employment relationship.[16] Therefore, the arbitration award is unassailable.

[28] As a rule, costs do not follow the result in this Court in line with the requirements of the law and fairness.

[29] I, accordingly, make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr

N Mnisi of Dumezulu Incorporated

For the First Respondent: Mr A Patel of Cliff Dekker Hofmeyr Incorporated

[1] Labour Relations Act 66 of 1995, as amended.

[2] See annexure KN06 to the founding affidavit, page 46.

[3] *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paras 14 to 16 and *Department of Education v Mofokeng Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC)

[4] 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)[2007] ZACC 22; ; [2007] 12 BLLR 1097 (CC); 2008 (2) BCLR 158 (CC) at para 79.

[5] *Supra* n 3 at para 244.

[6]

[2019] ZACC 7; (2019) 40 ILJ 965 (CC); 2019 (5) BCLR 609 (CC) ;

[2019] 6 BLLR 515 (CC) at para 25

[7] See Disciplinary Code ad Procedure, page 673 of the Record.

[8] See page 667 of the record.

[9] See page 682 of the record.

[10] See: Schedule 8 of the LRA.

[11] See: Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & others (2006) 27 ILJ 1644 (LC); Dagane v Safety & Security Sectoral Bargaining Council & Others (2018) 39 ILJ 1592 (LC) at para 22-23.

[12]

[2017] 4 BLLR 325 (LAC) at paras 19 to 20.

[13] At para [26] and see also Sappi Novoboard (Pty) Ltd v Bolleurs

(1998) 19 ILJ 784 (LAC) at para [7] [also reported at [1998] 5 BLLR 460 (LAC) – Ed]; CSIR v Fijen [1996] 6 BLLR 685 (AD) 691; Murray v Minister of Defence

[2008] ZASCA 44; [2008] 3 All SA 66 (SCA); [2008] 6 BLLR 513 (SCA); 2009 (3) SA 130 (SCA); 2008 (11) BCLR 1175 (SCA); (2008) 29 ILJ 1369 (SCA) at para [6].

[14] See SAPPI Novoboard (Pty) Ltd v Bolleurs [1998] 5 BLLR 460 (LAC) at para 7;

[15]

[2017] ZALCJHB 516; [2017] 7 BLLR 690 (LC) at para 11.

[16] Autozone v Dispute Resolution Centre of Motor Industry & Others

(2019) 40 ILJ 1501 (LAC) at paras 12-12.

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