IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA59/2017

In the matter between:

LETHOKGO ABRAM MALAPALANE **Appellant**

and

GLENCORE OPERATIONS SOUTH AFRICA

(PTY) LTD (GOEDEVONDEN COLLIERY) **First Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER M.A MASHEGOANA N.O **Third respondent**

Heard: **22 March 2018**

Delivered: **15 August 2018**

Summary: Review of an arbitration award - Employee dismissed for misrepresenting information regarding the grade of coal which resulted in loss of revenue and reputational damage – commissioner reinstating employee on the grounds that employer failed to prove intent and accepting the employee's contention that RBCT Laboratory used a different sampling method to that of

employer– Labour Court setting aside award and remitting dispute for arbitration *de novo*

Appeal - the question central to the appeal was whether the employee misrepresented to the employer that the coal test results furnished by his laboratory were accurate.

Held that the commissioner misconceived the nature of the enquiry when he concluded that the employer failed to demonstrate how the employee misrepresented information which led to the rejection of the 40 trains of coal - He overlooked that this was a disciplinary complaint and not a criminal offence. Held further, that there was intention to deceive on the part of the employee in that he made his employer to believe that the test results furnished were correct when, in fact, this was not true.

Court finding that Labour Court had sufficient evidence to substitute commissioner's award following its conclusion that the commissioner had misconstrued the nature of the enquiry – Appeal dismissed– Court substituting Labour Court's remittal order with an order to the effect that the dismissal of the employee was both procedurally and substantially fair.

Coram: Phatshoane ADJP, Jappie and Coppin JJA

JUDGMENT

PHATSHOANE ADJP

[1] This is an appeal against the whole of the Judgment and order of Labour Court (*per* Malindi AJ) delivered on 05 January 2017, reviewing and setting aside the arbitration award dated 10 February 2015 issued under Case No: MP9292/14 by Commissioner M.A Mashegoana ("the commissioner"), the second respondent, under the auspices of the Commission for Conciliation Mediation and Arbitration ("the CCMA"), the third respondent, and remitting the matter to the CCMA for

arbitration *de novo* before a different commissioner. The appeal is with leave of the Court *a quo*.

[2] Mr Lethokgo Abram Malapane, the appellant, was employed on 24 December 2013 in a senior position of laboratory superintendent by Glencore Operations South Africa (Pty) Ltd (Goedevonden Colliery) ("Glencore"), the first respondent. He was in charge of the GGV[1] Laboratory and had four supervisors and approximately 26 laboratory technicians reporting to him. He reported to Ms Silindekuhle Sizo Sithole, a senior metallurgist at Glencore and a head of a department.

[3] Ms Sithole had weekly meetings with the appellant when he commenced employment, where his KPI (key performance indicators) would be set and reviewed. He was trained and constantly coached to perform his job. An internal audit was also conducted which resulted in a number of findings being made. On the basis of these findings, Ms Sithole and the appellant looked into various disciplines within the laboratory system, such as the sampling, preparation and analysis of the coal samples and determined what measures to put in place in respect of each of these disciplines. Where the coal test results of the GGV laboratory were inadequate, or off specifications, the appellant would be tasked to conduct an investigation and draw an action plan to address the problems. When these failed, according to Ms Sithole, two counselling sessions were held with the appellant.

[4] The GGV laboratory was not accredited and therefore its test results had to be approved by the Richards Bay Coal Terminal ("RBCT"), which had efficient laboratory systems[2] and was accredited to test coal for the entire industry. The

[1] The acronym was not explained on the record.
[2] Ms Sithole described RBCT as having had "*highly optimised laboratory systems which have proven themselves*."

acceptable reproducibility[3] between GGV and RBCT is 0.3 mega joules. Anything above 0.3 mega joules will result in the rejection of the coal.

[5] Glencore relied on GGV laboratory to determine the quality of coal and would decide to which customer the coal, of a particular specification, would have to be directed. The accuracy of the test results was dependent on sampling, preparations and analysis of the samples. The test carried out on coal destined for the RBCT had to be correct and accurate. According to Ms Sithole, this also depended on sampling, preparation and analysis of the samples. As part of his duties, the appellant was responsible to coordinate the work of the GGV Laboratory which included the preparation of coal, analysis and reporting on the test results. Ms Sithole explained that on repeated occasions she received the test results from the GGV laboratory to the effect that the quality of coal was on specification and would rely on this information to make decisions on behalf of Glencore to dispatch the coal to the relevant customer, who will accept the product of the grade specified. However, upon reaching the customer concerned, the coal would be off-specification.

[6] Ms Sithole intimated that the reproducibility of the laboratory prior to the appellant's assumption of his leadership role was approximately 63%. The target set by Glencore was 70%. She explained that with the appellant's level of expertise and experience Glencore expected that the reproducibility would increase. However, under his stewardship, reproducibility declined to 30%. The price of coal was $65 per ton, and approximately R5.7 million in respect of one train, should the quality be on specification. Ms Sithole says that 40 trains were rejected by the RBCT laboratory during the period 01 May to 19 September 2014, because the GGV laboratory represented to Glencore that the coal was of a particular grade which proved to be false, following the tests which were

[3] This refers to the level of accuracy of the test results. Ms Sithole explained this to be the difference in the test results performed by two laboratories-the GGV and the RBCT. The difference should not be more than 3 mega joules per kg which is computed in terms of percentages. For example, where 10 trains are loaded in a period of a month and 7 of those trains are within 3 mega joules the reproducibility for the particular month will be 70%.

conducted by the RBCT. The rejection which was below acceptable levels caused Glencore reputational damage and loss of revenue in the amount of approximately R230 million.

[7] In defence of the claims of misrepresentation, the appellant explained that when he commenced working for Glencore, the laboratory had been outsourced to an institution called ALS. During January 2014, when ALS was in charge of the laboratory, Glencore experienced coal rejections which no one was held to account for. He took over the GGV laboratory at the end of January 2014 with no systems in place because ALS took its equipment on its departure. He intimated that the cause of the difference in the accuracy level of the test results conducted by his GGV laboratory and the RBCT was largely due to different equipment that was used by the two laboratories and their methods of sampling. His laboratory took samples of export coal from the conveyor belt every 15 minutes and put same in wastebaskets for preparation and analysis. After this 15 minutes interval, coal will pass (not sampled) on the conveyor belt to the train. He says that the RBCT did not use the same sampling method. In his view, the differences in the quality of coal were inevitable and would have had to be corrected through a process of investigation and rectifying faults as opposed to dismissing an employee.

[8] The appellant was subjected to a disciplinary enquiry on a charge of misrepresenting information regarding the grade of coal which resulted in loss of revenue and reputational damage to the GGV Laboratory. At the disciplinary hearing, it was found: that he did not verify the sample results presented to him by his laboratory; that he failed to pick up errors in the calculations made on the samples, which had an impact on their quality; that 40 trains had been rejected between May to September 2014, which resulted in loss of revenue; that he was aware that certain information was misrepresented and condoned this by not taking corrective action against his subordinates. He was found guilty as charged and dismissed from the services of Glencore on 17 October 2014. He challenged

the fairness of his dismissal by referring his dispute to the CCMA for conciliation and arbitration.

[9] In his arbitration award the commissioner found that Glencore had failed to demonstrate how the appellant misrepresented information which led to the rejection of the 40 trains by the RBCT due to poor quality. The commissioner was of the view that misrepresentation ought to have an element of intention to deceive the other party, and held that Glencore's case had never been that the appellant deliberately attempted to deceive it with the intention to benefit.

[10] The commissioner found that Ms Sithole was not credible because, in his view, she was selective in responding to questions posed. He further found that the misconduct in issue did not merit a sanction of dismissal because the GGV was not an accredited laboratory. In any event, he held that the GGV and the RBCT systems were different, in that the latter was automated and inspected regularly.

[11] The commissioner was of the view that the appellant was a credible witness who did not deviate from his undisputed version that, following the termination of the services of ALS, coal was transported directly into the trains via conveyer belts for distribution to the customers without having been tested. Further, that during the transportation, *en* route to Richards Bay, the exposed coal lost its moisture. He concluded that the appellant's dismissal was procedurally fair but substantively unfair. He awarded the appellant compensation in the amount of R342 000.00.

[12] On 10 April 2015, Glencore brought an application to review and set aside the commissioner's award in terms of s145 of the Labour Relations Act, 66 of 1995. On review, the Labour Court identified that the issue that arose for consideration was whether, absent accreditation, the GGV laboratory produced results that were credible. The case was not about the difference in the sampling test (repeatability) done at the GGV laboratory, but was about the certified quality of coal produced by GGV which had not been confirmed by the RBCT (reproducibility). The Court found that the appellant did not present evidence that

the GGV results were invalid. On the contrary, the appellant questioned why the RBCT results were preferred over his GGV's results.

[13] The Court *a quo* found the commissioner to have erred in the conduct of the arbitration proceedings because the central issue was not about which laboratory had been accredited. The appellant's version that the two laboratories were different and used different methods had not been put to Ms Sithole, whose unchallenged evidence was that the two laboratories used the same method of sampling. The Court found no substance in the commissioner's finding that Ms Sithole was not a credible witness. It had not been put to her that she was evasive. She fairly answered all questions put to her. It further found that the commissioner erred in relying on the appellant's version that the quality of coal could have been affected due to exposure to the elements because this version was not put to Ms Sithole.

[14] On the question of misrepresentation, the Court found that the GGV had to meet a target of 70% accuracy in respect of its coal specification. During the period May to September 2014 it achieved 50% and was at 30% in the latter part of the period. It found the appellant to have seriously deviated from the standard set. What had to be considered was whether his conduct constituted misrepresentation. It found that the commissioner incorrectly applied the criminal law requirements that misrepresentation must have an element of intent to deceive the other party. It held that intention was not a requirement. It was sufficient that over the period, despite attempts at corrective action, the appellant misrepresented to Ms Sithole that 40 trains had coal that met the specifications for the categories of quality that he communicated to Ms Sithole. The information he supplied was found to be incorrect because of the significant disparity in the data he provided from the required specifications.

[15] As already alluded to, the Court *a quo* reviewed and set aside the commissioner's award and remitted the matter to the CCMA for arbitration afresh before a commissioner other than the third respondent.

[16] The grounds of appeal can be summed up as follows. It was contended, for the appellant, that the Court *a quo* erred:

16.1 in reviewing and setting aside the arbitration award;

16.2 in finding that the commissioner incorrectly applied "the principle of misrepresentation";

16.3 in finding that the appellant was guilty of serious deviation from the company standards, notwithstanding that this was not a charge he faced.

16.4 in interfering with the credibility findings made against Ms Sithole by the commissioner when this aspect resided within the knowledge of the trier of facts;

16.3 in accepting Glencore's version without justification; and

16.4 in finding that there was mischaracterization of the offence committed, despite the precise nature of the charge and evidence to the contrary.

[17] The pertinent question to be ventilated in this appeal is whether the appellant made a misrepresentation to Glencore that the coal test results furnished by his laboratory were correct and accurate. The insurmountable hurdle the appellant faces is that he did not challenge the evidence that 40 trains were rejected by the RBCT laboratory during the period 01 May to 19 September 2014 because his GGV laboratory represented to Glencore that the coal was on specifications which proved to be false, following the tests which were conducted by the RBCT. He did not dispute that he provided Ms Sithole with false information, which Glencore relied upon to its detriment. He sought to exonerate himself from any wrongdoing by stating that the cause of the difference, in the accuracy level of the test results conducted by the two laboratories, was mainly due to different equipment that was used by these laboratories and their methods of sampling. The evidence by Ms Sithole that the two laboratories used the automated mechanical form of sampling was not challenged. The Court *a quo* was right that

this was not what this case was about. The issue, as correctly found by the Court *a quo*, was concerning the quality of coal produced by the GGV laboratory which had been rejected by the RBCT laboratory.

[18] Insofar as the commissioner concluded that Glencore failed to demonstrate how the appellant misrepresented information which led to the rejection of the 40 trains by the RBCT he misconceived the nature of the enquiry he was enjoined to undertake because he overlooked that this was a disciplinary complaint and not a criminal offence. There is a long line of authority in this Court on the formulation of disciplinary charges; that they need not be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the employer's disciplinary codes. It was sufficient that the misconduct alleged in the charge-sheet was set out with sufficient clarity so as to be understood by the employee.[4] In any event, in my view, there was an intention to deceive on the part of the appellant in that he made Ms Sithole to believe that the test results furnished were correct when, in fact, this was not true.

[19] The criticism by the commissioner that Ms Sithole was not a credible witness is not borne out by the record. In *Medscheme Holdings (Pty) Ltd v Bhamjee,*[5] the SCA sounded a warning against undue weight to the advantages that are said to be enjoyed by the trial court without a careful evaluation of the evidence that was given, as opposed to the manner in which it was delivered, against the underlying probabilities. Furthermore, in *Minister of Safety and Security and Others v Craig and Others NNO,*[6] the SCA remarked:

> '[58] Although courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness's demeanour, but predominantly upon inferences and other facts, and upon probabilities. In such a

[4] *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2011) 32 ILJ 2455 (LAC) at para 32; *First National Bank—A division of First Bank Ltd v Language and Others* (2013) 34 ILJ 3103 (LAC) at 3108 para 23.
[5] 2005 (5) SA 339 (SCA) at 345 para 14.
[6] 2011 (1) SACR 469 (SCA) at 479 para 58.

> case a court of appeal, with the benefit of a full record, may often be in a better position to draw inferences.'

[20] Having had the benefit of perusing the record, I am of the view that, the Court *a quo* was correct in finding that Ms Sithole answered questions put to her fairly. Not the same can be said of the appellant. While one appreciates that he represented himself at arbitration, and was therefore a lay litigant, he never put his defences to Ms Sithole, *inter alia*, that difference in the accuracy level of the test results conducted by his GGV laboratory and RBCT was due to different equipment that was used by the two laboratories and their methods of sampling, or that the quality of coal could have been affected by loss of moisture when conveyed to the RBCT laboratory. Regard being had to the importance of the issues he raised, and further taking into account his level of seniority and expertise, it could not have escaped him to put his defences to Ms Sithole when the opportunity presented itself.

[21] In accepting the appellant's defences, which were not relevant to the question he was called to answer, the commissioner committed a gross irregularity in the conduct of the arbitration proceedings. His assessment of the evidence was incorrect and resulted in a decision which a reasonable decision-maker could not reach. The Court *a quo* correctly concluded that the arbitration award stood to be reviewed and set aside. What merits attention is whether this case ought to have been remitted to the CCMA for arbitration afresh before a different commissioner. The basis upon which the Court *a quo* remitted the matter to the CCMA is not apparent from the record. This Court in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*[7] held:

> '[58] Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court 'is in as good a position' as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the

[7] (2015) 36 ILJ 1511 (LAC) at 1538 para 58.

> Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination by a court of review of whether to remit the matter to the CCMA for reconsideration or substitute its own decision for that of the commissioner.'

[22] The Court *a quo* fully traversed the merits and made a finding that the GGV Laboratory failed to meet the reproducibility target of 70% in respect of its coal specification and that the appellant had seriously deviated from the standard set. It then concluded that: *"It is sufficient that the complaint is that over a period, and despite endeavours to correct the situation, he represented to Sithole that the 40 trains contained coal that met the specifications for the categories of quality that he communicated to Sithole."* All that remained was the determination of the appropriate sanction to be imposed upon the appellant for the deviation. There was, in my view, sufficient material before the Court *a quo* to make that determination. After all, what would be the point of remitting the matter when the Court had already made a substantive finding on the merits. This would merely serve to prolong the inescapable results.

[23] By the appellant's own admission he was well experienced and a "perfect person for the job". He worked in laboratories in different capacities since 2006. The system of graduated discipline, which Ms Sithole says she invoked in the quest to assist him to produce the reproducibility target set, came to naught. All that he ought to have done was to inform Ms Sithole of the correct test results of his laboratory so that the coal produced could be directed to a customer prepared to accept the coal of that quality. Instead, he opted to deceitfully provide incorrect information on the results. The undisputed evidence, that his misconduct resulted in approximately R250 million loss in revenue to Glencore and concomitant reputational damage, cannot be downplayed. On the whole, I am of the view, that the sanction of dismissal is appropriate in the circumstances of this case.

[24] Regard being had to the requirements of law and fairness I am not swayed that the costs should follow the result of the proceedings in the Court *a quo* and this appeal because the arbitration award issued by the CCMA may have led to the appellant's entertainment of false hopes of achieving success in pursuing this litigation. In the result I make the following order:

Order

1. The appeal is dismissed with no order as to costs.

2. The order of the Court *a quo* is set aside and substituted with the following:

"1. The application to review and set aside the arbitration award dated 10 February 2015 issued under Case No: MP9292/14 by Commissioner M.A Mashegoana, the third respondent, under the auspices of the Commission for Conciliation Mediation and Arbitration, the second respondent, is upheld;

2. The arbitration award dated 10 February 2015, issued under Case No: MP9292/14, is reviewed and set aside;

3. The dismissal of Mr Lethokgo Abram Malapane, the first respondent, from the services of Glencore Operations South Africa (Pty) Ltd (Goedevonden Colliery) ("Glencore"), the applicant, is found to have been substantively and procedurally fair.

4. No order is made as to costs."

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MV Phatshoane

Acting Deputy Judge President - The Labour Appeal Court

Jappie and Coppin JJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT:	Mr C Mogane
	Instructed by Moshoana Mabena Mogane Inc.
FOR THE FIRST AND	
SECOND RESPONDENT:	Mr D Cithi
	Instructed by Mervyn Taback Inc.