IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA83/18

DE BEERS CONSOLIDATED MINES LTD	
(VENETIA MINE)	**Appellant**
and	
NATIONAL UNION OF MINEWORKERS	**First Respondent**
EVODIA RATHIPA LANDELA	**Second Respondent**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Third Respondent**
COMMISSIONER K ELIAS NO	**Fourth Respondent**

Heard: **27 November 2019**

Delivered: **11 December 2019**

Summary: review of arbitration award—employee dismissed for failing to declare a conflict of interest arising out of dealings with a contractor and sub-contractor- Court finding that employee misconducted and conflicted herself because of her involvement in the transaction between the contractor and sub-contractor- court nevertheless finding that sanction of dismissal inappropriate but reinstating

employee as from 01 July 2019. Labour Court's judgment set aside and appeal partly upheld.

Coram: Waglay JP, Jappie JA and Kathree-Setiloane AJA

JUDGMENT

WAGLAY JP

[1] This is an appeal against the judgment of the Labour Court (Moni AJ) which dismissed the review application brought by the appellant against the award handed down by the Commission for Conciliation, Mediation and Arbitration (the third respondent). The fourth respondent, the commissioner had found the dismissal of the second respondent (employee) substantively unfair and ordered her reinstatement.

[2] The employee was in the appellant's employee for over 15 years without a blemish to her record. At the time of her dismissal, she held the position of a procurement clerk responsible for contract management and procurement of outside service providers.

[3] The employee was found to have contravened the appellant's code of business conduct and ethics by failing to disclose or avoid a conflict of interest. The appellant held that such conduct amounted to a failure to perform her duties conscientiously, honestly and in the interest of the appellant. She was accordingly dismissed.

[4] The facts that gave rise to the dismissal are straight forward. Nel who is employed by the appellant as an investigator testified at the arbitration that he was called upon to investigate a complaint raised by Grace Security's (Grace) proprietor one Mudau. The complaint was that the appellant had failed to pay Grace for services rendered by it to the appellant. His investigation revealed that: appellant contracted with Genesis Electric Services (Genesis) – one of its service providers – to fix an alarm at one of its properties. Genesis was unable to provide the service and sub-contracted the work to Grace. Nel then established that two technicians employed by Grace called on Mabasa, one the proprietors of Genesis, to meet with them urgently. The two technicians, Mabasa and the employee were at this meeting. The technicians indicated to Mabasa that they required a loan of R20 000 to purchase the alarm kit and to set up an office for Grace in Musina (where the appellant owned properties – it was apparently envisaged that the appellant was in the process of building in excess of a further 100 houses in Musina). Mabasa agreed to lend the money and it was agreed that this would be deposited into the employee's bank account. According to the employee, the two technicians were her tenants and did not have a banking account, so she allowed them to use hers. Before making the deposit, Mabasa enquired why he was required to deposit the money into a personal account rather than the business account of Grace, and was informed that it was okay to do so as the account holder (the employee) was employed by the appellant. On receiving payment, the employee withdrew R15 000.00 and paid it over to the technicians, a further R2000.00 was paid over a day or two later. Nothing is said about the balance of R3000. According to Nel, the employee informed him that she then gave her bank card to one of the technicians so he could draw the balance of the loan.

[5] Grace completed the task and sent an account in the sum of R8960.00 to Genesis for payment. Genesis added its mark up and invoiced the appellant for R11 564.00. The appellant duly paid Genesis. Genesis refused to pay Grace; its refusal was based on the fact that it had lent Grace R20 000.00 and the R8960.00 was set off against that loan. Grace was therefore still indebted to it.

[6] Grace refused to accept this, hence its attitude that appellant owed it the money because it rendered the service to the appellant and the appellant refused to pay.

[7] After the dispute between Grace and Genesis reared its head, the employee made a disclosure to the appellant to the effect that two persons (being the technicians of Grace referred to earlier) were tenants on her property. It must be added that the appellant has a strict rule requiring employees to disclose any possible conflict of interest an employee may have.

[8] The employee had taken the attitude that since she had no business interest in either Grace or Genesis and the money deposited into her account was not for her benefit but that she merely accommodated her tenants, there was no duty on her to disclose that information.

[9] All of the above evidence was gathered by Nel's investigation and was compiled as a report. On receipt of the report, the appellant decided to prefer misconduct charges against the employee. It appears that what concerned the appellant was that the employee, a procurement clerk responsible for contract management and procurement, was involved with parties who were rendering a service to the appellant. They took the view that even if she had no business interest in either of the businesses nor received any benefit from the loan between the two businesses, her involvement by being present at the negotiation of the loan and its payment into her banking account obliged her to make the disclosure. The fact of the matter was that both Genesis and Grace were rendering services to the appellant and the investigation showed that the employee was aware of that.

[10] The employee avers that she was not under any obligation to declare the deposit of R20 000 into her bank account because the source of payment was not linked to the appellant's business, adding that the transaction between the contractor and the sub-contractor had nothing to do with the business of the appellant. She further states that she could not have disclosed what she was not aware of, and that she was merely assisting her tenants to receive money from a source that she was not aware of and was completely ignorant that the tenants worked for a

sub-contractor that was connected to the contractor who was a service provider to the appellant.

[11] The principles related to review of arbitration awards are now trite and need not be restated. Suffice to say that arbitration awards may be set aside if the award is disconnected from the evidence resulting in an unreasonable outcome. Notwithstanding defects in an award, if the arbitrator arrived at a reasonable decision, the award will not be interfered with. Reasonableness is, therefore, the yardstick against which an award is assessed.

[12] The question here is whether the employee was under the duty to disclose the transaction and her dealings with the two employees of Grace. The commissioner took the view that the appellant could not prove that the employee had any business interest in either Genesis or Grace and, as such, found that the employee did not commit the misconduct with which she was charged. The commissioner held that the employee was merely the sacrificial lamb to protect the appellant's reputation as Mudau (Grace) had threatened to go to the media about the non-payment for the service it had rendered to the "appellant"[1].

[13] The appellant, dissatisfied with the arbitration award sought to review and set aside the award. The Labour Court, like the commissioner, found that the appellant failed to prove that the employee broke the rule relating to the duty to disclose. It held that the evidence before the commissioner did not indicate that the employee knew where the money, deposited into her account for the benefit of the technicians, came from or that the technicians were sub-contracted by one of the appellant's service providers. The Labour Court further found that the appellant failed to show that the entire event caused any potential risk to the appellant. On this basis, the Labour Court found that the conclusion reached by the commissioner was rationally connected to the reasons given based on the material available to him, and was therefore reasonable.

[1] Clearly, Grace had not rendered any services to the appellant but to Genesis.

[14] Sadly, it appears that both the commissioner and the Labour Court failed to properly consider the evidence presented at the arbitration and simply disregarded some of the evidence presented. I fail to comprehend on what basis could the evidence of Nel, which confirmed that the employee was present when the R20000 loan was negotiated between the employees of Grace (her tenants) and Genesis, and that part of the loan was for Grace to purchase the alarm kit that was necessary to render the service that Genesis had contracted to render to the appellant, could be disregarded when this evidence was never challenged. And no explanation is provided for what she was doing attending a meeting between Grace and Genesis. Furthermore, if the employee had no knowledge of the contractual arrangement between Genesis and Grace and that this related to services to be rendered to the appellant, then there would also have been no reason for her to make a disclosure of the tenancy of Grace's employees.

[15] I also fail to understand the commissioner's finding that the employee was a "sacrificial lamb"! The appellant contracted with Genesis and paid Genesis for the work done. The dispute between Genesis and Grace, notwithstanding that Grace had threatened to go to the press for non-payment of its account was of no consequence to the appellant and easily explained away by the appellant but for the involvement of the employee. Because her involvement meant the involvement of the appellant in a private transaction between two companies involved in rendering a service to the appellant, hence the appellant could not simply disregard what transpired between the employee and the two businesses. Even if the employee simply facilitated the service that was rendered to the appellant by providing her banking details for Genesis to make a payment to Grace then, in my view, she had a duty to disclose such information to the appellant and her failure to do so must constitute a breach of the rule and, as such, she was guilty of the misconduct complained of.

[16] Added to this is the unchallenged evidence that she was present at the meeting at which the appellant's service provider agreed to make the loan to Grace for amongst other things, to purchase items needed to provide a service required by

the appellant, then whether she received any benefit or not was totally irrelevant as she had a duty to inform her employer about her involvement with the two companies.

[17] With regard to the potential reputational risk, here it must be taken into account, no matter how inappropriate or groundless the complaint lodged by Mr Mudau of

Grace regarding the non-payment of the service rendered by it and its threat to go to the media, this would have exposed, as stated earlier, the involvement of an employee of the appellant with its external service provider, and this could cause it potential reputational harm.

[18] The fact of the matter is as the appellant contends: the employee was central to the whole dealings and should have declared her interest or at least her involvement to the appellant. In this appellant is correct. The employee's version that all she did was allowed her tenants to use her account becomes totally far-fetched when she declares that having paid them R17000 she then decides to hand over her bank card to them to withdraw the R3000. This is bizarre. Not only does she help these tenants of hers, but also gives them her bank card - to an account which is in regular use. In my view, the employee's story is so far-fetched that it should be rejected as being false. More importantly, I do not accept that a person in the position of the employee would simply give her banking details and her bank card to some people living at her premises who, on her own admission, she only knew on their first names.

[19] As an employee in procurement, specifically dealing with outside service providers, she could not ignore that Genesis and therefore Mr Mabasa is a service provider of the appellant. This should have alerted her of the need to disclose the deposit. The simple fact that the employee had received money from Mabasa of Genesis, a service provider of the appellant, is on its own a conflict of interest and she should have disclosed that to the appellant.

[20] The lack of candour becomes more pronounced when she only discloses to the appellant her housing the two Grace's employees this also only after Mr Mudau of Grace made the complaint. The employee chose to disclose that she rented a room to two tenants of Grace but conveniently ignored the fact that she should have disclosed receiving money on their behalf in her bank account.

[21] Notwithstanding all of the above, the Labour Court agreed with the commissioner that the appellant failed to prove on the probabilities that the employee failed to disclose her conflict of interest.

[22] It seems implicit in the commissioner's reasoning that the clause of the Code of Ethics under which the employee was charged was inconsistent with the evidence led. The commissioner was of the view that there was no conflict of interest because the employee had no business interest with Genesis and Grace. This was a rather artificial analysis of the evidence and a failure to analyse the evidence holistically. Of course at face value, the employee did not have any business interest with either Genesis or Grace and did not have anything to disclose. However, a holistic assessment of the evidence shows that she was involved with the parties who were service providers to her employer and, as such, she had a duty to disclose this. In the circumstances, the only reasonable finding on the evidence presented to the commissioner was that the employee had committed the misconduct with which she was charged.

[23] On the appropriateness of the sanction that should have been imposed much is made about the evidence of the employee's immediate superior who testified at the disciplinary hearing that the employee should not be dismissed. Just because one in authority over an errant employee requests that dismissal be avoided, does not mean that the presiding officer is bound to grant such a request. This evidence may mean that the working relationship can be restored but it does not mean that dismissal is nonetheless not the appropriate sanction.

[24] Although the employee is guilty of the misconduct, I am not satisfied that this is a matter where dismissal is not an appropriate sanction. However, reinstatement

with full back-pay disregards the serious wrong committed by the employee. I believe that it is more appropriate that there is a serious penalty for her misconduct and that her reinstatement only takes effect from 01 July 2019.

[25] In the result, I make the following order:

31.1 The appeal succeeds partially.

31.2 The award of the arbitrator is set aside and replaced with the following:

"The dismissal of the employee is substantively unfair and that she be reinstated as from 01 July 2019."

31.3 There is no order as to costs.

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Waglay JP

I agree

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Jappie JA

I agree

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Kathree-Setiloane AJA

APPEARANCES:

FOR THE APPELLANT: Mr Doctor Cithi

Instructed by Mervyn Taback Attorneys

FOR THE FIRST AND SECOND:

RESPONDENTS:	Adv Q M Dzimba
	Instructed by Mothobi Attorneys