IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: C814/06

In the matter between:

NUM obo I KGAPENG Applicant

AND

COMMISSIONER FOR CONCILIATION,

MEDIATION AND ARBITRATION First Respondent

S.M. OSMAN N.O Second Respondent

HOTAZEL MANGANIES MINE Third Respondent

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review the arbitration award under case number NC760/06 dated 29th November 2006 issued by the second respondent, ("the commissioner"). In terms of the arbitration award, the commissioner found the dismissal of the applicant who was represented by NUM to have been both substantively and procedurally fair.

[2] The third respondent has applied for condonation for the late filing of its answering affidavit. Having regard to the explanation tendered for the lateness

of the filing of the answering affidavit, I see no reason why such late filing should not be condoned.

Background facts

[3] The applicant, Mr Kgapeng was prior to his dismissal by third respondent employed as a miner during June 2006. The applicant was charged and dismissed for allegedly tempering with the dates on a doctor's sick note.

[4] It is common cause that Dr Grobler issued a sick note advising that Mr Kgakatsi (Kgakatsi) was not able to attend work from the 18th September 2005 to 20th September 2005. Kgakatsi submitted such a medical certificate to the third respondent for the purposes of explaining his absence from work on those days reflected therein.

[5] The sick note when presented to the third respondent apparently appeared to have been interfered with. It was for this reason that the third respondent conducted an investigation about the authencity of the medical certificate.

[6] During the investigation, the applicant made a statement which indicated Kgakatsi was responsible for the change of the dates on the medical certificate. Kgakatsi was as a result of the statement made by the applicant charged with misconduct, found guilty and dismissed. However on appeal it was found that the person who tempered with the sick note was the employee and not Kgakatsi. The chairperson of the appeal upheld the appeal and directed that Kgakatsi be re-instated and then issued a final written warning against him.

[7] Following the outcome of the appeal hearing of Kgakatsi, the applicant was charged with the following:

> *"6.1 making falls written and oral statements on the 25th October 2005 and 1 November 2005 which led to Kgakatsi's dismissal, and*
>
> *6.2 forgery in that Kgapeng change the dates on the medical certificate as issued by Doctor Grobler."*

[8] The employee being unhappy with the outcome of the disciplinary hearing lodged an appeal. His appeal was unsuccessful but made subject to further investigation. A further appeal was convened at the end of March 2006 cheered by a different person to the one who cheered the earlier one. A second appeal was dismissed and the dismissal of the applicant confirmed.

[9] The employee being unhappy with the outcome of the appeal hearing then referred a dispute concerning an alleged unfair dismissal to the CCMA challenging both the procedural and substantive fairness of his dismissal.

The Grounds for Review and the Award

[10] The applicant contended that the commissioner committed gross irregularity by accepting incorrect and contradictory evidence and thus rendered the outcome concerning the fairness of his dismissal unjustified. The employee further criticised the commissioner for accepting hearsay evidence contrary to the provisions to the Law of Evidence Amendment Act 45 of 1998.

[11] The commissioner in his analysis of the evidence presented during the arbitration hearing started of by indicating that the applicant failed to challenge the version of the respondent that the dismissal was substantively fair. In this respect the commissioner found that the employee was responsible for the alteration of the sick note and that he was aware that that conduct constituted an act of dishonesty.

[12] The commissioner says that the sanction of dismissal was in line with the policy of the respondent and therefore fair. The commissioner arrived at the conclusion that the dismissal of the applicant was fair on the bases of the evidence of Mr Serema ("Serema"), who testified that the doctor had not change the dates on the medical certificate and that he was told by Kgakatsi that the applicant had changed the dates on the medical certificate.

[13] The doctor's receptionist, Miss Motlapi ("Motlapi") testified that she was approached by the applicant and Kgakatsi who told her that the applicant had cancelled the sick note. Motlapi testified further that Kgakatsi indicated that they need a sick note otherwise the applicant could be dismissed and further nobody should know that they had visited the doctors room. Kgaketsi also requested that Motlapi should, if asked, accept that the date on the medical certificate was changed by her. It would appear that initially Motlapi refused but under pressure agreed to comply with the request by the applicant and Kgakatsi. She however testified that although she had agreed as per the request by the applicant and Kgakatsi she had resolved on her own that she would not do it.

[14] The commissioner accepted the version of Motlapi and found her to be a credible witness who was eager to tell the truth.

[15] The chairperson of the appeal hearing testified that he adjourned the case when Kgakatsi accused the applicant of having changed the sick note. He testified that he adjourned the hearing for further investigation and avoid having to prejudice the employee.

[16] The chairperson of the disciplinary hearing testified that the applicant did not dispute the allegations which were made against him. He also found that the applicant contradicted himself during the hearing when he said that he did not change the sick note and later on admitted having done so.

[17] The investigator of the allegations against the applicant, Mr Prinsloo ("Prinsloo") testified that he interviewed Dr Grobler who indicated that he had not made changes to the sick note.

[18] The case of the applicant during the arbitration hearing was that he had accepted the medical certificate from Kgakatsi and that he did not notice the changes until he was so informed by the HR department. He denied ever visiting the doctor's room to have the sick note changed.

[19] The commissioner found that the applicant was not a satisfactory witness because he failed to answer questions during cross examination or pretended not to understand questions put to him. According to the commissioner the applicant claimed to have been confused because he had two sick notes. In this respect the commissioner had the following to say:

"23. The applicant proved to be a deplorable witness and was often hesitant in answering questions and behaved as if he did not understand the questions, unlike the enthusiasm in his testimony in chief. I am not inclined towards the version of the applicant I am of the opinion that though the reason for the applicant having tampered with the sick note is not known, the applicant had in fact tampered with the note. The applicant is therefore guilty as charged.

24. Further to the above I am not satisfied that the applicant was notified of the disciplinary hearing. Mr Seremi had issued preliminary charges to the applicant. According to the policies of the respondent it was satisfactory to issue preliminary charges whilst the investigation was conducted into the misconduct of an accused. The applicant on page 33 signed for the notice. He testified that the applicant did not challenge the evidence at the disciplinary hearing nor did he cross-examine any of the witnesses. The applicant had also lodged on appeal. The preliminary notification would be followed by a formal notification. This gives the respondent the opportunity to articulate it's charges"

Evaluation

[20] The test for review is set out in *Sidumo & Another v Rustenburg Platinum Mine Ltd & Others (2007) 28 ILJ 2405 (CC)* paragraph 110 as follows:

> *"To summarise, Care phone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner is one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."*

[21] In my view, the commissioner's decision cannot be faulted for unreasonableness. As appears from the above discussion it is apparent that the commissioner accepted the version of the respondent in coming to the conclusion that the dismissal was fair.

[22] It is common cause that Dr Globber issued a sick note which was presented to the third respondent. The employee did not dispute that the date on the sick note had been altered but however disputed that he was responsible for the alteration.

[23] The version of Kgakatsi is that he and the applicant visited the doctor's rooms and requested the receptionist to say that she was responsible for changing the dates on the sick note. This version was confirmed by the receptionist who as

indicated earlier had initially refused to comply with the request but under pressure agreed whilst knowing that she would not do it.

[24] It is apparent from the reading of the arbitration award that the commissioner resolved the conflicting versions as to who was responsible for the alteration of the sick note by way of a credibility finding.

[25] The approach adopted by the commissioner is correct and is in line with the one established in our law. See also *Rex v Dhlungwayo* 1948 (2) SA 677 (A), *City Lodge Hotels Ltd v Gildenhuys NO & Others* (1999) 20 ILJ 2332 (LC) and *De Beers Consolidated Mines Ltd v CCMA & Others (2000) 21 ILJ 1051 (LAC).*

[26] As concerning the appropriateness of the sanction it has already been indicated above that the commissioner found the sanction of dismissal to be in line with policy of the respondent and accordingly appropriate in the circumstances. Thought out the process the applicant denied involvement in the alteration of the sick note. He also denied all other facts which are clearly in my view supported, without any doubt, by the probabilities. He for instance denied having visited the doctor's rooms in the face of un-contradicted evidence of both Motlapi and Kgakatsi.

[27] In *De Beers Consolidated Mines Ltd v CCMA & Others (2000) 21 ILJ 1051 (LAC)* at 1059 D- E it was held that:

> *"Acknowledgment of the wrongdoing is the first step towards rehabilitation. In the absence of a recommittement to the employers' workplace values, an employee cannot hope to re-establish the trust*

which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where z high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great."

Inconsistency

[28] The approach adopted when dealing with the issue of inconsistency in disciplinary hearings is set out in *SACCAWU & Others v Irvin Johnson Limited (1999) ILJ 2303 (LAC)* at 2313, paragraph 29 the court held that:

"*It was argued before us by Mr Grobler for the appellants that by not dismissing four employees who had also participated in the demonstration, the respondent applied discipline inconsistently. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of gravity of the disciplinary offence was wrong. It cannot be fair that the other employees profit from that*

kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair it is capricious, or induced by improper motives or, worse, by a discriminating management policy."

[29] In the present instance it cannot be disputed that Kgakatsi had some role to play in the dishonest act associated with the altering of the sick note. He accompanied the applicant to the doctor's room to persuade Motlapi to lie about how the change to the sick note was effected. He was thus aware of the offence committed by the applicant. However the offence committed by Kgakatsi was of a lesser server nature than that of the applicant. The respondent took action against Kgakatsi but on the bases of the severity of the offence imposed a final written warning and not dismissal as was the case with the applicant.

Hearsay evidence

[30] The contention that the commissioner allowed hearsay evidence is based on the testimony of both Serema and Prinsloo who testified that Dr Grobler never made changes to the sick note. Dr Grobler never testified during the arbitration hearing.

[31] Hearsay evidence in our law is governed by the provisions of section 3(1) of the Law of Evidence Amendment Act 45 of 1988 (LEAA) which provides that hearsay evidence shall not be admitted as evidence, unless the party against whom such is to be adduced agrees to its admission-, the person upon whose credibility the probative value of the evidence depends testifies or –

"(c) The court having regard to -

(i) The nature of the proceedings,

(ii) The nature of the evidence:

(iii) The purpose for which the evidence is tendered-

(iv) The probative value of the evidence-,

(v) The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends-,

(vi) Any prejudice to a party which the admission of such evidence might entail-, and

(vii) Any other factor which should in the opinion of the court be taken into account is of the opinion that such evidence should be admitted in the interests of justice."

[32] It is now well established that arbitration proceedings are covered by the provisions of the LEAA. See *Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union & another (2000) 21 ILJ 1315 (LAC) and (Swiss South Africa (Pty) Ltd v Louw NO & others (2006) 27 ILJ 395 (LC)- [2006] 4 BLLR 373 (LC) President of the Republic of South Africa v South African Rugby Football Union and Others 1999 (10) BCLR 1059 (CC).*

[33] In *Makhathini v Road Accident Fund (2002) 1 ALL SA 413 (A)* the Supreme Court of Appeal in dealing with the issue of admission of hearsay evidence had the following to say:

"It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The

exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value. . . . There is no principle to be extracted from the Act that it is to be applied only sparingly. On the contrary, the court is bound to apply it when so required by the interests of justice.

In each case the factors set out in section 3(1) (c) are to be considered in the light of the facts of the case. The weight to be accorded to such evidence, once it is admitted, in the assessment of the totality of the evidence adduced, is a distinct question.

The factors set out in section 3(1) (c) (i)–(vii) should not be considered in isolation. One should approach the application of section 3(1) (c) on the basis that these factors are interrelated and that they overlap. See Hewan v Kourie NO and another 1993 (3) SA 233 (T) at 239B–C and Schmidt and Rademeyer's Bewysreg (supra) at 481 where the learned authors state."

[34] In the present instance it is important to note that the employee never disputed that the doctor's sick note was altered and that those alterations were not made by Dr Grobler. The evidence of the witnesses of the respondent who testified that Dr Grobler did not alter the sick note was not challenged during cross examination. The respondent was thus on the bases of the above authority entitled to assume that the version of the two witnesses was accepted as being

correct and therefore the necessity to call Dr Grobler to testify never arose. Thus the approach adopted by the commissioner cannot be faulted as being irregular or unreasonable.

[35] In the light of the above evaluation I am of the view that the applicants have failed to make out a case justifying interference with the arbitration award of the commissioner. Therefore the applicant's application to review and set aside the commissioner arbitration award stands to fail. I see no reason in law and fairness why the costs should not follow the result.

[36] In the premises the review application is dismissed with costs.

Molahlehi J

Date of Hearing : 28 January 2010

Date of Judgment : 23 April 2010

Appearances

For the Applicant : Adv N Cloete

Instructed by : Neville Cloete Attorneys

For the Respondent: Adv Polelis

Instructed by : Nkaiseng Chenia Baba Pienaar Swart Inc