THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No JR 438/13

In the matter between:

Applicant

BADER SA (PTY) LTD

And

First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

Second Respondent

COMMISSIONER G. S. JANSEN VAN VUUREN N.O.

Third Respondent

COLLIN MOCHE

Heard: 12 July 2016

Delivered: 20 December 2016

JUDGMENT

MOTHIBI, AJ

Introduction

[1] This is an application brought under Section 145 of the Labour Relations Act 66 of 1995 ("LRA") for the review and setting aside of an arbitration award issued by the Second Respondent on 22 February 2013 acting under the auspices of the First Respondent and under case number Case number GATW9896-11) ("the arbitration award").

[2] In terms of the arbitration award, the Second Respondent (the Commissioner) found the dismissal of the Third Respondent (Moche) by the Applicant to be procedurally and substantively unfair. The Commissioner accordingly ordered the Applicant to reinstate Moche to his position as a Cutter with effect from 1 July 2012 on the terms and conditions of employment that applied to him prior to his dismissal. Moche was dismissed on 31 May 2011 for alleged insubordination.

[3] His dismissal arose out of an incident which occurred on or about 23 February 2011. It was alleged by the Applicant that he defied an instruction by his supervisor to take his lunchbreak at a particular time, stayed away from his work place for two successive lunch intervals and dishonestly informed his supervisor and the production manager that he had received permission to do so from the factory manager.

Analysis

[4] The Applicant seeks to review and set aside the arbitration award on the basis that the Commissioner erred in finding Moche's dismissal to be substantively

and procedurally unfair and that his findings in that regard are unreasonable and constitute defects as contemplated in Section 145 (2)(a)(i) and (ii) of the LRA in that he:

4.1 Failed to apply his mind to the evidence before him and unreasonably rejected the evidence led by the Applicant to prove that Moche was dishonest;

4.2 Misconstrued the law relating to inconsistency in the application of discipline and ignored material evidence relating to that issue;

4.3 Erred grossly by finding that Moche was guilty of insubordination but yet had not been dishonest;

4.4 Erred grossly by finding that the circumstances did not yield the conclusion that the employee was guilty of a serious breach of the trust relationship;

4.5 Erred further by applying too stringent a test for the particularity of the "charge", when it was clear to Moche from the outset why he was being disciplined and what he had to explain;

4.6 Misconstrued item 4(2) of the code by finding that the Applicant had not complied with it; and

4.7 That the Commissioner erred by ordering the Applicant to reinstate Moche with retrospective effect or at all.

[5] Moche filed an answering affidavit seeking to oppose the review application brought by the Applicant. In doing so he raised a preliminary point challenging the deponent to the Applicant's founding affidavit's authority to

bring the application on behalf of the Applicant and secondly sought condonation for the late service and filing of his answering affidavit.

[6] I will deal with both preliminary issues at the outset.

[7] I agree with the Applicant's submission that Moche's point *in limine* is without merit and should be dismissed. It is clear that the deponent to the Applicant's founding and supplementary affidavit, a certain Mr Mark Johannes Oosthuizen did so in his capacity as a person who had personal knowledge of the facts material to the dispute between Moche and the Applicant and in any event has attached a duly completed resolution from the Applicant authorising him to bring this review application on behalf of the Applicant. The point *in limine* is accordingly dismissed.

[8] I now turn to deal with the failure by Moche to file his answering affidavit within the time periods provided for in the rules of this court. In this regard Moche's affidavit was filed some eight months out of time. The Applicant has asked that Moche's affidavit ought not to be admitted in circumstances where he has, as submitted by the Applicant, failed to provide this court with cogent reasons for the inordinate delay in filing his answering affidavit. Furthermore that in any event, having regard to the Applicant's review application, Moche's prospects of success are slim.

[9] I have considered the reasons given by Moche for the delay in filing his affidavit within the requisite time periods. I am also cognisant of the fact that he was at all material times an unrepresented litigant. In my view no prejudice whatsoever would be suffered by the Applicant should I admit and consider

Moche's answering affidavit. I have accordingly exercised my discretion in his favour and have considered his answering affidavit in making this ruling.

[10] What remains for me to do is to determine the merits of the review application.

Merits

[11] For the reasons that I expand on fully below I find that the Commissioner's award should be reviewed and set aside because it is not one which a reasonable decision maker in the Commissioner's position would have made and furthermore that he has committed certain gross irregularities as set out below. I further set aside and substitute his findings that Moche's dismissal was procedurally and substantively unfair with the finding that Moche's dismissal was procedurally and substantively fair.

[12] The first gross irregularity committed by the Commissioner relates to his refusal to consider the record of the disciplinary proceedings that preceded Moche's dismissal. In this regard and as appears from the record of the proceedings, it is apparent that the Commissioner first refused to allow the Applicant's representative an opportunity to lead evidence relating to the disciplinary proceedings and thereafter, when challenged in respect of his attitude in this regard, indicated that if the Applicant's representative insisted on leading such evidence he would ignore it. The Commissioner's refusal to consider the record of the disciplinary hearing, which formed part of the bundle of documents used as evidence by the Applicant at the arbitration proceedings constitutes a gross irregularity. As the Applicant correctly points out in its heads of argument, the respective records of the disciplinary hearing and the arbitration proceedings indicates that Moche changed his version in

certain material respects which I need not deal with in this judgment. Suffice to state that Moche's differing versions tend to indicate that he was a less than credible witness which conclusion should have been top of mind in determining whether, having regard to the Commissioner's ultimate finding that Moche was guilty of insubordination, reinstatement was appropriate.

[13] In addition, I agree with the submissions made by the Applicant, that the Commissioner contradicted himself in making his findings. This is because and as appears from his award, after assessing Moche's evidence, the Commissioner found that it was "a fabrication, devoid of all truth." Yet, notwithstanding his latter finding that Mr Moche was unreliable and by implication lied to the arbitration proceedings, he found that the Applicant had "failed to prove an element of dishonesty." Quite clearly the Commissioner's reasoning in this regard is untenable having regard to his own findings. On the Commissioner's own finding, Moche was dishonest. His reasoning in this regard is contradictory and indicates that he failed to apply his mind to the evidence before him and unreasonably rejected evidence led by the Applicant to prove that Moche was dishonest.

[14] In addition, the Commissioner's award should be set aside having regard to the fact that he makes a finding that the Applicant failed to prove that the trust relationship between Moche and it had broken down but at the same time has as a fact, found that Moche was dishonest. Quite clearly, where dishonesty is proved it must generally follow that trust has been breached.

[15] The Commissioner committed a gross irregularity by finding that the Applicant had failed to prove the element of dishonesty in circumstances where it

appears that in making the latter finding, he unreasonably relied heavily on what Bokaba allegedly said at the arbitration proceedings. As the Applicant correctly points out in its heads of argument the Commissioner misconstrued the nature of the evidence before him and the factual issues that he had to determine. The essence of the charge that Moche faced was the allegation that he took an extended lunch break in defiance of his supervisors' and production manager's express refusal to grant him permission to do so. It is clear from the record and indeed the arbitration award that both Sanjieni and Bokaba testified that Moche had given them the impression that Crafford had granted him permission to take a double lunch break. The Commissioner latches on a minor conflict in their evidence in this regard on what actually happened when Moche spoke to them both but ignores the probabilities that whatever Moche said his conduct and words created the impression in the minds of both Sanjieni and Bokaba that he had the requisite permission to take a double lunch break. Indeed the latter version although denied by Moche, must be the correct version having regard to the Commissioner's own finding that Moche's evidence was "a fabrication, devoid of all truth". In those circumstances the only evidence that could and should have been accepted is that of Sanjieni and Bokaba being that, Moche had dishonestly created the impression that he had the requisite permission. This latter impression was false. This falsehood goes to the heart of whether the trust relationship between Moche and his employer could in the circumstances continue. Quite clearly it could not and in the circumstances I find that the Commissioner misdirected himself and that his decision in respect of his finding that the Applicant failed to prove dishonesty cannot stand. I find that the only

probability that can be reached in the circumstances is that Moche misled his employer on whether he had the requisite permission to address fellow workers during the lunchtime break and in so doing his misconduct smacked of dishonesty.

[16] As I have already said, where an element of dishonesty is attached to a particular act of misconduct (in this case insubordination), it goes to the heart of the employment relationship. The question then in these circumstances is whether the trust element essential for any employment contract to endure, has been irretrievably breached. I have no hesitation in finding that having regard to the evidence before the Commissioner the reasonable conclusion is that there has been an irretrievable breakdown of trust caused by Moche's misconduct.

[17] I find that for this reason as well as those alluded to above the Commissioner's findings in respect of the element of dishonesty and the trust relationship between Moche and his employer are to be reviewed and set aside as they are unreasonable.

[18] The Commissioner also made a finding that the Applicant had acted inconsistently and on that basis ordered his reinstatement. He however found Moche guilty of insubordination and ordered that Moche be issued with a final written warning.

[19] The Commissioner failed to take into account the Applicant's uncontested evidence at the arbitration that Moche's circumstances differed from those of other employees who had been charged with the same offence arising out of the events of 23 February 2011 in that at the time of his disciplinary hearing

he was on a valid warning for unauthorised absence from work. In addition it is clear from the record that the Applicant led evidence at the arbitration distinguishing Moche's circumstances from those of Mosaka and others who were found guilty but were not dismissed. They were issued with written warnings. In this regard the evidence of the Applicant was that the nature of Moche's misconduct (he had defied instructions from three of his superiors) indicated that it was gross in nature. It was on this basis that he, unlike the other employees who were not dismissed, was dismissed.

[20] It is apparent that the Commissioner misconstrued the nature of the evidence before him and failed to take into account relevant evidence which would have indicated that the Applicant did not act inconsistently when it dismissed Moche. In any event as the Applicant points out in his heads of argument, an employee who had otherwise been fairly dismissed can only rely on inconsistency if it is proved that his employer acted in bad faith. There is no suggestion that the Applicant acted in bad faith. It is trite in our law that historical inconsistency will not assist an employee who is aware of the rule concerned (*SACCAWU & Others v Erwin & Johnson Limited* [1999] 20 ILJ 2302 (LAC). I accordingly find that the Commissioner's award falls to be reviewed and set aside on this basis too.

[21] I turn now to consider the Commissioner's finding and ruling that Moche's dismissal was procedurally unfair. I find that the Commissioner committed a gross irregularity in making this finding and further that the Commissioner, by finding that the Applicant has failed to comply with Item 4(2) in the code of good practice found in the LRA, misconstrued the nature of the enquiry in so

far as this item is concerned and further that his finding that the Applicant accordingly acted procedurally unfairly was unreasonable having regard to the evidence before him. In this regard the Commissioner committed a gross irregularity by finding that the Applicant had failed to consult with Moche's trade union prior to charging him (Moche was a shopsteward) notwithstanding the evidence before him which indicated that Moche's union was indeed fully aware that the Applicant had decided to institute disciplinary action against its shopsteward and had invited the union to a consultation meeting. The fact that the meeting did not take place does not mean that the Applicant did not attempt to hold the meeting with the union. In any event a consultation does not necessarily require a face to face meeting between the parties. Quite clearly the Applicant attempted to comply fully with the letter and spirit of Item 4(2) of the guidelines found in the LRA but its attempts to do so were frustrated. In any event it is trite that the code as found in Item 4(2) is but a guideline and should not be elevated to the status of peremptory requirements for a dismissal of a shopsteward to be fair. In the circumstances the finding of the Commissioner on this point falls to be reviewed and set aside.

[22] The Commissioner also found that the dismissal of Moche was procedurally unfair because the charge put to Moche at his disciplinary enquiry lacked particularity. Again the Commissioner's finding in respect of the alleged lack of particularity of the allegations put to Moche at the disciplinary enquiry is unreasonable having regard to the evidence before him. It was the uncontested evidence of the Applicant's witnesses at the arbitration that at the commencement of the disciplinary hearing the allegations were explained to Moche who did not seek further particularity and that in any event it was

apparent that he was aware of the alleged rule that he had breached and when such breach is alleged to have happened.

[23] It is trite in our law that disciplinary enquiries are not meant to replicate the criminal justice module. The Labour Appeal Court recently settled the age old question of what should be contained in a charge sheet. In the matter of *Woolworths (Pty) Ltd v CCMA & Others* ([2011] 32 ILJ 2455 (LAC)) it held the following:

> *"[32] Unlike in criminal proceedings were it is said that the 'description of any statutory offence in the words of the law creating the offence, all in similar words, shall be sufficient', the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant's disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of anyone of or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained. In this regard I refer to the work of Le Roux and Van Niekerk where the learned authors offer a suitable example, with which I agree:*
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> > *'Employers embarking on disciplinary proceedings occasionally define the alleged misconduct incorrectly. For example, an employee is charged with theft and the evidence either at the disciplinary enquiry or during the Industrial Court proceedings, establishes unauthorised possession of company property. Here the rule appears to be that, provided a disciplinary rule has been contravened, that the employee*

> *knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterisation, discipline appropriate to the offence found to have been committed may be enclosed.'"*

[24] Having regard to the aforegoing I am of the view that the allegation which Moche faced at his disciplinary enquiry (particularly having regard to the evidence led at the arbitration proceedings) was sufficiently clear to allow him to fully understand the allegation that was put to him. I accordingly find that the Commissioner's ruling and finding in this regard was unreasonable having regard to the evidence before him. It is accordingly set aside.

[25] For all the aforegoing reasons I find that the Commissioner's award should be reviewed and set aside.

[26] It should be apparent from the aforegoing that the evidence before the Commissioner and which was available to this Court is sufficient to allow this Court to substitute its own ruling in respect of whether the dismissal of Moche was fair in the circumstances. It is apparent from the evidence presented that Moche indeed was insubordinate towards three of his superiors. It was gross in nature. Furthermore that he was dishonest not only at his disciplinary hearing but indeed at the arbitration proceedings as found by the Commissioner. I also find that Moche's insubordination smacked of dishonesty in circumstances where he dishonestly created the impression to his superiors that he had the requisite permission to take a double lunch break on 23 February 2011 when this in fact was not so. In the light of all the aforegoing I find that his dismissal was substantively and procedurally fair.

[27] In the premises I make the following order:

(1) The award issued by the Commissioner under case number GATW9896-11 is reviewed and set aside;

(2) The dismissal of the Third Respondent was procedurally and substantively fair;

(3) There is no order as to costs.

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J Mothibi

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	J Grogan
Instructed by:	*Lexicon Attorneys*
On behalf of the Respondent:	Rudolf Kuhn *of Rudolph Kuhn Attorneys*