REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 604/15

In the matter between:

SASOL TECHNOLOGY (PTY) LTD Applicant

and

THE NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY First respondent

Sello MOPHAKI N.O. Second respondent

Zukile DYOLISI Third respondent

Heard: 2 February 2017

Delivered: 9 March 2017

SUMMARY: Review – dismissal – misconduct – absenteeism without leave and dishonesty. Arbitrator found dismissal to be unfair on the basis of double jeopardy. No double jeopardy shown. Award reviewed and set aside.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Sasol Technology (Pty) Ltd, seeks to have an arbitration award by the second respondent (the arbitrator) reviewed and set aside. He ruled that the dismissal of the third respondent, Mr Zukile Dyolisi (the employee) was unfair.

Background facts

[2] The employee was a senior scientist earning R52 261 per month. He was dismissed for misconduct comprising absenteeism without leave and dishonesty relating to fraud.

[3] At the time of his dismissal, the employee reported to Louis Johannes Botha. The allegations of misconduct leading to his dismissal related to an earlier period when he reported to Stephan de Goede.

[4] The employee was first called to a disciplinary hearing in February 2013. The charges were that he was absent without leave on 18 September, 23 November, 21 and 24 December 2012; that he failed to enter sick leave records for 5, 11 and 12 February 2013; that he abused the flexitime system; and that he acted dishonestly.

[5] The chairperson of that hearing, Erasmus, found that the employee did commit misconduct by failing to comply with the company's procedure for entering sick leave. He imposed a final written warning on 27 March 2013.

[6] After the employee had been called to that hearing, further incidents of alleged misconduct came to light, relating to an earlier time period when he reported to Mr de Goede. On 28 May 2013 the company called the employee to a second disciplinary hearing on the following allegations of misconduct:

> "ABSENTEEISM (counts 1-8) Vacation leave
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> You contravened clause / rule 1(d) of the [disciplinary] code relating to absenteeism, in that on/about [sic] the dates mentioned below, you intentionally and unlawfully absented yourself from work, without leave

approval from your line manager(s) and/or approval on the ESS1, as follows:

1. From 22 December 2008 until 09 January 2009 (16 days);
2. From 17 July 2008 until 21 July 2008 (5 days);
3. From 29 August 2008 until 31 August 2008 (3 days);
4. On 4 December 2009 (one day);
5. From 27 June 2007 until 29 June 2007 (3 days);
6. From 3 February 2010 until 5 February 2010 (3 days);
7. From 22 February 2010 until 24 February 2010 (3 days); and
8. On 29 October 2009 (one day).

CHARGE: DISHONEST CONDUCT (Count 9)

9. You contravened clause / rule 5(b) of the code relating to **fraud**, in that you intentionally and unlawfully defrauded the employer in an amount of +/- **R 40 923, 60** by failing to capture your vacation leave on the ESS, whereby you encashed those days and thereby causing a loss on the part of the employer.

CHARGES: ABSENTEEISM (Counts 10-14) Sick leave

10. On 11 July 2011 (one day);
11. From 21 July 2011 until 22 July 2011 (2 days);
12. From 26 October 2011 until 28 October 2011 (3 days);
13. On 21 February 2012 (one day); and
14. On 24 May 2012 (one day)."

[7] The chairperson of the second disciplinary hearing (Robertson) found that the employee had committed the misconduct complained of in counts 1, 3, 4, 5, 8 and 9. He found that dismissal was the appropriate sanction. The sanction was upheld in an internal appeal.

[1] An acronym for "Employee Support System".

Arbitration award

[8] The parties signed a pre-arbitration minute. The employee was represented by a legal practitioner, Mr Chrispen Machingura. Sasol was represented by its employee relations manager, Mr Alfred Tema.

[9] The arbitration was a lengthy one. It took place over 14 days. The arbitrator correctly identified the dispute, as agreed by the parties in the pre-arbitration minute:

> "Whether or not there was a rule in the workplace clearly describing the misconduct;
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> whether or not the [employee] was aware of such a rule;
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> whether or not the [employee] breached the rule;
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> whether or not the reasons for dismissing him were fair; and
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> whether or not Sasol followed its disciplinary code."

[10] The arbitrator heard evidence of the following witnesses for Sasol:

10.1 Louis Johannes (LJ) Botha, chief scientist. The employee reported to him from July 2011 to June 2013. He had previously reported to Stephan de Goede from 2007 to 2010.

10.2 Stephan de Goede, the employee's previous line manager.

10.3 Leon Havemann, remuneration specialist.

[11] The following witnesses, apart from the employee himself, testified for him:

11.1 Paul Morgan, senior manager for energy technology.

11.2 Olebogeng Ishmael Moeketsi, the employee's representative at the disciplinary hearing.

11.3 William Fergus Robertson, the chairperson of the second disciplinary hearing. The employee had subpoenaed him to the arbitration. His questioning by the employee's legal representative was in the nature of cross-examination.

[12] Having considered the evidence, the arbitrator reiterated that the parties had agreed at the pre-arbitration conference that the dispute comprise the following:

12.1 whether there was a rule in the workplace clearly describing the misconduct;

12.2 whether the employee was aware of such a rule and whether he had breached it:

12.3 whether or not there was any reason to dismiss him; and

12.4 whether the Sasol disciplinary code was followed.

[13] The arbitrator concluded that there was a rule clearly describing the misconduct; that the employee's counsel did not attempt to argue that he was not aware of the rule or that he did not breach the rule; and that, instead, he based his argument on factors that amounted to "clutching at straws".

[14] Having said that, the arbitrator then went further and mentioned that he would not confine himself to what the parties agreed he should determine. He cited in support of that decision that the court held in *CUSA v Tao Ying Metal Industries*[2] that commissioners should identify the real issue in dispute and resolve that issue effectively and speedily. He then formed the view that the real issue was whether Sasol had breached the 'double jeopardy rule', although that was not raised as an issue in dispute by the parties in the pre-arbitration minute.

[15] The arbitrator then summarised the law as follows:

> "Returning to the issue that I believe is the real issue, I need to mention that if employees have been acquitted at a disciplinary hearing, or if the chairperson of the disciplinary hearing has imposed a penalty less severe than dismissal, employees cannot generally be subjected to a second hearing in respect of the **same** offence. A dismissal in such circumstances would almost invariably be unfair. However, the court may in exceptional circumstances condone breaches of the 'double jeopardy rule'.

[16] The arbitrator considered the decision of the LAC in *BMW (SA) (Pty) Ltd v Van der Walt*[3] where Conradie JA held:

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[2] (2008) 29 *ILJ* 2461 (CC).

[3] (2000) 21 *ILJ* 113 (LAC) para [13].

> "It would be unfair to compel an employer to retain an employee in whom it has justifiably lost all confidence. That must have been the case here when the full extent of the respondent's deceit became apparent. And since the loss of confidence justifiably occurred only after a first disciplinary enquiry had been held, I do not consider that it was unfair to hold another."

[17] Although the employee in this case was called to a second disciplinary hearing relating to different charges only after the first hearing had been held, the arbitrator distinguished the situation from *BMW* because the further evidence come to light during the investigation leading to the first disciplinary hearing.

[18] The arbitrator also considered the decision of the LAC in *Branford v Metrorail*[4]. In that case, the employer had issued an employee with a written warning for making fraudulent petty cash claims. Further evidence came to light leading to a disciplinary hearing where the employee was dismissed. The court held that the test in *BMW* was one of fairness; and that the dismissal on those facts was fair.

[19] Despite having considered these LAC authorities, the arbitrator held that the employee in this case was subject to double jeopardy. That is because Sasol had discovered the further evidence before the first hearing, but nevertheless concluded the first hearing before calling the employee to another one to deal with the new evidence that it had uncovered. He accepted that it was clear that the employee "was not charged with the same incidences but with different incidences". Nevertheless, he said that the misconduct "or incidences or the facts of cause of action in the second disciplinary hearing were used as aggravating factors in the first hearing". On that basis, he found that there was a breach of the double jeopardy rule; that the decision of dismissal was a foregone conclusion in the second hearing; and that the dismissal was substantively and procedurally unfair.

[20] The arbitrator also held that the chairperson of the second hearing, Robertson, was biased. He considered him to have been evasive when questioned by the employee's counsel in the arbitration hearing; and that

[4] (2003) 24 *ILJ* 2269 (LAC); [2004] 3 BLLR 199 (LAC).

he was not even-handed at the disciplinary hearing. His main reason for saying so was that he allowed the company's representative to quote from a criminal law book written by Prof CR Snyman but wouldn't allow the employees representative to do the same.

[21] With regard to procedural fairness, the arbitrator found that Sasol had failed to comply with its disciplinary code because the chairperson had been biased.

[22] Having found that the dismissal was unfair, the arbitrator nevertheless ordered reinstatement without backpay because the employee "was not squeaky clean". He reiterated that the employee and his representative "were clutching at straws when the alleged that there was no rule clearly describing the misconduct; that he was not aware of such a rule; and that he had not breached the rule." The only reason on which he based his finding of unfairness was that the double jeopardy rule had been breached.

Grounds of review

[23] Mr *Pretorius*, for Sasol, relied on the following main grounds of review:

23.1 The arbitrator refused to consider Sasol's written argument that was filed one day late.

23.2 The arbitrator did not decide the dispute before him as outlined by the parties in their pre-arbitration minute. Instead, he raised the issue of double jeopardy *mero motu* and then made it the main *ratio* for his award.

23.3 He wrongly found that the double jeopardy rule applied in circumstances where the misconduct complained of in the first disciplinary hearing and that in the second disciplinary hearing was not the same.

23.4 The employee's legal representative was allowed to cross-examine his own witness, Robertson.

23.5 The arbitrator unreasonably found that the hearing was not procedurally fair and that the chairperson, Robertson, was biased.

23.6 Reinstatement was in any event not an appropriate remedy.

Evaluation

[24] In considering whether the arbitration award should be reviewed and set aside, I shall consider each of these arguments in turn.

Refusing to consider Sasol's written argument.

[25] After the extensive evidence, the parties agreed to file written heads of argument. The company's representative did so one day late. The arbitrator records that he "did not consider them as they were late and as I had not received an application for extension".

[26] The deponent to Sasol's affidavits in this application, Mr Selaocwe Setiloane, has explained that the company's closing submissions could not be delivered in time because of an electricity blackout which made it impossible to finish typing the submissions out on a personal computer. A former colleague, Joe Kgosi, phoned the Bargaining Council. He spoke to a Semphete Pholoholo who agreed that Sasol could deliver its admissions a day later and undertook to inform the arbitrator. It does not appear as if this happened. Nevertheless, the submissions were delivered on 10 February 2015. It appears from the Bargaining Council's date stamp that the arbitrator only sent the award to it on 17 February. Sasol only received it on 27 February 2015.

[27] It was unreasonable of the arbitrator not to take into account the company's written submissions in these circumstances. In *Standard Bank of SA Ltd v Fobb*[5] Pillay J held:

> "Whether the failure to consider the replying argument is a reviewable irregularity depends on whether the omission is material. It is material if it could have influenced the discretion of the Commissioner. The Commissioner made credibility findings against certain of the applicant's witnesses. The applicant, in the replying argument, addresses this issue. This alone amounts to a material defect. Although there were other instances where the replying affidavit was material to the deliberations of

[5] [2002] 9 BLLR 900 (LC) para [14].

the Commissioner, it is not necessary to traverse them all. What the merits or demerits of the submissions were in the reply is not the test. The fact that they related to material actually considered by the Commissioner, as manifest from his award, is sufficient to class them as material to the decision. If the Commissioner had considered the replying affidavit he might have found that the fourth respondent had misconducted himself or come to some other conclusion. The failure or omission to consider the replying argument before making his award is a reviewable irregularity."

[28] A similar view was expressed more recently by Van Niekerk J in *Zenith Administration Services (Pty) Ltd v Mthethwa*[6]:

"The requirement that an arbitrator give the parties a full opportunity to have their say in respect of the dispute is of course an integral element of the right to a fair trial, to which the parties are entitled. A failure to afford a party a fair hearing is in itself a ground for review (see *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC) at paragraph [20] where the court required that an arbitrator give the parties a 'full opportunity to have their say in respect of the dispute'). Heads of argument in this context are significant – they contain the submissions made by a party based on the evidence and seek to persuade a commissioner to arrive at a particular result. Despite the attempts by the third respondent's representative to downplay the nature and role of heads of argument or to suggest that the result would have been no different, in my view, a failure by a commissioner to have regard to heads of argument would have the result that the threshold established by the *Goldfields* decision is not met. Heads of argument play a critical role in the determination of any dispute; they present the decision-maker with a means to define the real issues in dispute and provide the parties with a final opportunity to influence the outcome. In the present instance, as I have indicated, there is no explanation for the commissioner's failure to have regard to the applicant's heads of argument, which were timeously submitted, in accordance with the arrangement that had been agreed between the commissioner and the parties. The failure by the commissioner to have regard to the applicant's heads of argument in the circumstances is, in my view, in itself a reviewable irregularity. The commissioner's award accordingly stands to be reviewed and set aside."

[6] [2014] ZALCJHB 491 pa [9].

[29] I agree. The award should be set aside for this reason as well.

Considering the wrong dispute

[30] The parties clearly delineated the dispute. The employee was legally represented. Yet the arbitrator found the dismissal to be unfair for an entirely different reason, viz an alleged breach of the 'double jeopardy rule' by the employer.

[31] Parties are generally bound by their position in a pre-trial minute, absent an amendment, as the minute is regarded as part of the pleadings. In support of this contention, Mr *Pretorius* referred to this *dictum* by Basson J in *NUMSA v SA Truck Bodies (Pty) Ltd*:[7]

> "As a general rule parties should be held bound by the terms of an agreement (such as a signed pre-trial agreement) unless considerations of public policy or good morals dictate that a party should not be held to the terms of an agreement".

[32] That was a trial before the Court. Arbitration is a less formal procedure; yet, where a party is legally represented, as here, it would in my view be desirable to keep that party to the dispute as delineated by him and his counsel.

[33] In *NUMSA v Driveline Technologies (Pty) Ltd* [8] the LAC recognised a pre-trial agreement as –

> '…a consensual document which binds the parties thereto and obliges the court (in the same way as the parties' pleadings do) to decide only the issues set out therein. In particular, a party who agrees to claim only limited relief would be bound by his agreement (*Shoredits Construction (Pty) Ltd v Pienaar NO* [1995] 4 BLLR 32 (LAC) at 34C–F).'

[34] That *dictum* was applied to a pre-arbitration minute by the LAC as recently as 3 February 2017 in *MEC for Education (North West Provincial Government) v Makubalo*[9]*.*

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[7] (2008) 29 *ILJ* 1944 (LC) par [4].

[8] [2000] 1 BLLR 20 (LAC) at para 16.

[9] [2017] ZALAC 13 par [18].

[35] To use the language of *Goldfields Mining*[10], the arbitrator did not identify the dispute he was he was required to arbitrate, nor did he understand the nature of the dispute as delineated by the parties. That is a reviewable irregularity.

[36] In response, Mr *Baloyi* referred to the authority the arbitrator had relied upon, viz *CUSA v Tao Ying Metal Industries*[11] where the court held:

> "The absence of appeal from arbitral awards was intended to speed up the process of resolving labour disputes and free it from the legalism that accompanies other formal judicial proceedings. By adopting this simple, quick, cheap and informal approach to the adjudication of labour disputes, Parliament intended that, as far as it is possible, arbitral awards should be final and should only be interfered with in very limited circumstances. In order to give effect to these objectives, Parliament deliberately decided against appeals from arbitral awards and opted for the narrowest species of review, namely, that specified in section 145 of the LRA.
>
> Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do."

[37] In this case, there was no issue what the real dispute between the parties was. The employee was dismissed. He complained that it was unfair. The reason for his saying so was set out by his counsel in the pre-arbitration minute. The issue of 'double jeopardy' was not the real dispute between

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[10] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 1214 (LC) par [20].

[11] [2009] 1 BLLR 1 (CC); (2008) 29 *ILJ* 2461 (CC) paras 64-65.

the parties; that is something that the arbitrator seized upon in the course of the arbitration.

[38] But in any event, the conclusion that the arbitrator reached when applying the 'double jeopardy' principle, was not a reasonable one. I turn now to that aspect, which goes to the heart of the arbitration award.

Double jeopardy

[39] The arbitrator correctly summarises the evidence before him, concluding that "the first charge sheet had different dates or incidences to the ones in the second charge sheet". He also correctly states the legal principle that "employees cannot generally be subjected to a second hearing in respect of the same offence". Yet he finds that the double jeopardy rule applies to this case and that, because of that, the dismissal was unfair – even though the employee did commit serious misconduct and even though he was dishonest.

[40] The fact is that the two hearings did not consider the same misconduct (or, in the arbitrator's words, the same "offence"). In both instances, the main complaint related to the abuse of leave, failing to record it, and then lying about it; but the second hearing dealt with entirely different time periods and specific incidences. And what is more, the employee had to answer an entirely different allegation in the second hearing: that is that he, in common parlance, defrauded the employer to the tune of R40 923, 60. He did so by encashing leave days that he was not entitled to.

[41] In finding that this was a case of double jeopardy, the arbitrator committed an error of law.[12] He also reached a conclusion on the facts that another arbitrator simply could not reasonably have come to. The conclusion is irrational and not sustained by the evidence. The award is reviewable for those reasons.

[12] Cf *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551 and *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) 266 (SCA) paras 69-73.

Cross-examining own witness

[42] My finding on the reasonableness of the arbitration outcome as a whole renders the issue of the employee's counsel cross-examining Robertson largely moot. But I agree with Mr *Pretorius* that, even in more informal arbitration proceedings, especially where a party is legally represented, a witness subpoenaed by that party should be declared hostile before counsel should cross-examine him.[13]

Procedural fairness and bias

[43] The arbitrator found that "the conduct of the chairperson of the second disciplinary hearing, Robertson, was indicative that the decision of dismissal was a foregone conclusion"; and that he was not even-handed. The only reason he gives for coming to this conclusion is that "he allowed [the employer's] representative to quote from a criminal law book by Professor Snyman and when the [employee's representative] did the same he stopped him"; and that the employee's counsel "referred to many incidences of bias on the part of Robertson".

[44] Having perused the transcript of the arbitration, I could not find these "many incidences of bias on the part of Robertson". Nor could Mr *Baloyi* point me to them. On my reading of the transcript, no reasonable perception of bias arises. The parties were given a fair hearing at arbitration.

The relief granted

[45] Having found that the commissioner came to an unreasonable conclusion, the review ground relating to relief also becomes moot. But I also agree with Mr *Pretorius* that, even if the commissioner had correctly interpreted and applied the double jeopardy principle, and even if he reasonably concluded that dismissal was not a fair sanction for that reason, he should not have ordered reinstatement. The employee had committed serious misconduct. He was dishonest. He lied to his employer and enriched

[13] Cf Zeffert *The South African Law of Evidence* (2009) at 905-6 in the trial context.

himself. The trust relationship had broken down. In those circumstances, no reasonable arbitrator could have ordered reinstatement.

Conclusion

[46] The award must be reviewed and set aside. It would serve little purpose to remit it. The parties have led extensive evidence over the course of 14 days. The only elements of the award that call out for remittance rather than substitution, are the way in which the employee's representative was allowed to cross-examine Robertson, the witness he had subpoenaed; and the arbitrator's refusal to consider Sasol's written argument. But all the evidence – comprising seven legal arch files – is before this court. It would only lead to unnecessary further delays and costs to remit the dispute.

[47] Regarding costs, I take into account that the employee had an award in his favour and that he has already incurred significant legal costs. I do not consider a costs award to be appropriate in law or fairness.

Order

[48] I therefore make the following order:

48.1 The arbitration award by the second respondent dated 7 February 2015 is reviewed and set aside.

48.2 The award is replaced with the following:

"The dismissal of the employee, Zukili Dyolisi, is procedurally and substantively fair."

48.3 There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	D O Pretorius of Fluxmans Inc.
THIRD RESPONDENT:	F I Baloyi
Instructed by	Mothuloe attorneys.