THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

Of interest to other judges

CASE NO: JR 2296/12

In the matter between:

BAFOKENG RASIMONE PLATINUM MINE (PTY) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER MASHOODA PATEL (*N.O.*)	**Second Respondent**
RYK BOTHA	**Third Respondent**

Heard: 13 August 2014

Delivered: 8 July 2015

Summary: (Review – failure to grant postponement irregular – award reviewed and set aside – Practice of augmenting case on review in heads of argument or additional affidavit dissaproved)

JUDGMENT

LAGRANGE, J

Background

[1] In this matter, the arbitrator found that the dismissal of the third respondent Mr R Botha ('Botha') was substantively and procedurally unfair and reinstated him with retrospective effect to the date of his dismissal. Botha had been dismissed after being found guilty of "bringing the company into disrepute as company resources were used in an improper way". The charges arose from the private use of Botha's company email address to send a couple of sexually explicit messages to a third party who was not employed by the applicant. The email address bore the company's logo at the foot of the email. The applicant seeks to review and set aside the application. An interlocutory question which also needs to be determined is if a further affidavit filed by the applicant more than four months after pleadings have closed in which the applicant sought to introduce further grounds of review ought to be admitted as part of the pleadings.

The applicant's "additional affidavit"

[2] Pleadings in the matter closed on 14 February 2013 when the applicant filed its replying affidavit two months after Botha had filed his answering affidavit. No condonation was sought for the late filing of the replying affidavit, though the third respondent did not oppose this being granted. As no identifiable prejudice was occasioned by this and as it adds little to the applicant's case in any event, I am willing to condone this. The applicant's supplementary affidavit had been filed together with the record in early December 2012 more than five weeks after the transcript had been finalised on 19 October that year. Subsequently, on 12 July 2013, some five months after the close of pleadings, the applicant simply filed its "additional" affidavit in the matter. No proper application to file an additional

affidavit was made, though a motivated request for its inclusion was contained in the affidavit itself.

[3] The gist of the motivation was that it was “crucial and necessary” to admit the further affidavit because:

3.1 The submissions in the affidavits did not relate to “new matters but factual matters that are really contained in the record” and which the applicant merely wished to bring to the court’s attention.

3.2 These matters were nonetheless “crucial and substantive” ones that should not be ignored in determination of the issues in the review application.

3.3 The court was obliged to ventilate “all the issues in the matter in order to arrive at a just decision”, which required all the relevant issues to be placed before the court for determination.

3.4 There would be no prejudice to the respondents as the court ”will afford them the opportunity to respond to the contents of this affidavit”

3.5 the court was not bound by the approach adopted by the parties’ representatives in the CCMA proceedings if that meant that the relevant facts and the real dispute between the parties would be ignored., provided those facts appeared in the record.

[4] When the matter was argued it became apparent that the issues that the applicant wished to raise in the additional affidavit had come to light after counsel had perused the application. All the material on which the additional affidavit was based was already before the applicant’s attorneys by the time the supplementary affidavit was filed. Review applications by their nature give the applicant party ample time to consider the merits of its case before filing a supplementary affidavit. No reasons were advanced why the matters raised in the additional affidavit could not have been raised in the supplementary affidavit. The fact that an applicant subjects the record to more careful scrutiny after pleadings have closed and discovers further points it could have raised previously but did not, does not amount to exceptional circumstances justifying the reopening of the pleadings. The

applicant argued that there would be no prejudice to the third respondent, because the court would obviously grant him an opportunity to respond if the additional affidavit was admitted. On this principle, an applicant could keep adding to its case *ad nauseam* and a respondent party would have to keep incurring further costs for each additional perusal of the record required to consider the new points raised as and when the applicant deigned to reconsider its case. Insofar as the admission of additional affidavits is a matter of fairness to both parties, there is nothing fair about allowing a party to add to its case in the absence of a very satisfactory explanation for the earlier omission.

[5] Pleadings are intended, amongst other things, to identify the nature and parameters of a dispute. Care must be taken at the time of drafting to ensure that the full ambit of a party's case is canvassed. In the case of the review application an applicant has the added advantage that a weak founding affidavit can be completely replaced or augmented by a supplementary affidavit. It is at that point of the applicant's preparation of the application that it must focus its mind on the merits of its case. It should not regard the supplementary affidavit as merely a preliminary exploration of issues to be more fully developed when heads of argument are prepared. Still less should it consider the supplementary affidavit as anything less than its final statement of its grounds of review. There may be exceptional circumstances where issues come to light that a party exercising reasonable diligence in the preparation of their case could not have been aware of, or where there is some other justifiable reason why a material issue is omitted. In this case no such reason has been provided to excuse admissions from the applicant's founding papers. I see no justification for the third respondent to be burdened months later with having to consider answering further matters that should have been raised at the time the supplementary affidavit was filed.

[6] Consequently, the additional affidavit filed by the applicant should not be admitted.

The award

Legal Representation

[7] The arbitrator decided to permit Botha legal representation despite the opposition of the applicant, which was represented by its employment relations coordinator. The arbitrator decided that the nature of the charge which entailed bringing the employers' name into disrepute was not a simple matter like absenteeism and could give rise to a number of legal issues. In turn this made the matter potentially complex. She decided that issues of public interest did not arise as a consideration. On the question of the comparative abilities of the parties the arbitrator was satisfied that the employer representative was much better equipped in terms of his job and experience to deal with the arbitration proceedings and that notwithstanding the seniority of Botha and some training in disciplinary enquiries, he had no experience of actually conducting any and would not be able to match the expertise of the applicant's representative, without legal representation.

Postponement Application

[8] The applicant only led one witness and requested a postponement of the matter after that witness's evidence was complete. The missing witness was apparently *en route* from Limpopo and advised the applicant's representative by sms that he was stuck in traffic roadblock. When the applicant's representative attempted to contact the witness again at around 10H30 the witness could not be reached and he requested a postponement of the matter so that a *subpoena* could be issued to secure the witness's attendance. Botha objected to the postponement because the matter had apparently previously been postponed at the applicant's request and he had travelled from Koffiefontein, more than 7 hours away, to attend the hearing and would be prejudiced if it was postponed again. Botha's attorney argued that he had made arrangements to *subpoena* his witnesses and the applicant ought to have done the same.

[9] The arbitrator refused the application for postponement after waiting for a further two hours for the elusive witness to appear. The arbitrator appears to have refused

the postponement on the basis that ample time was given for the witness to arrive given that the distance to be travelled to the arbitration hearing was only 60 km and the prejudice to Botha of a further postponement. She also agreed with the applicant that the witness could have been *subpoenaed*. Although she did not say so in so many words, it appears that the arbitrator was understandably sceptical about the explanation that the witness was stuck in traffic given his failure to appear after four hours and the fact that he could not be contacted again. Clearly the arbitrator would not have mentioned the relevance of the witness not being issued with a *subpoena* to attend the hearing if she did not believe that it was more likely that the witness was reluctant to attend.

[10] After refusing the application for postponement, the applicant's representative persisted with his request for the matter to be postponed and offered to tender the wasted costs of the day and asked the Commissioner to hear him on that issue. However, the arbitrator was not sympathetic to reconsidering her ruling in the light of this belated tender.

Substantive Issues

[11] In the course of the arbitrator's summary of evidence, she mentioned that:

11.1 there was evidence of private emails containing jokes sent by employees to third parties who are not employees, which were not regarded as unacceptable use of company resources;

11.2 there was also evidence which the employer's witness could not dispute about a senior manager having been found guilty of sending email with pornographic content, who was given a final written warning and of another employee who had been found with pornographic content on his computer, who was still employed by the applicant;

11.3 two other Managers testified that Botha's conduct had no impact on his work.

[12] It should also be mentioned that during the course of cross-examination of the applicant's witness, Mr. Marais, when he was pressed on the origin of the charge in the applicant's disciplinary code, he referred to the charge of: "Negligence.

Misuse of company property for private purposes" and conceded that this did not deal with bringing the company into disrepute. He also agreed that there was no evidence that the company's reputation had been brought into disrepute but contended that if the emails in question had ended up in the wrong hands that would have reflected negatively on the company. He also agreed that in terms of the code the offence of bringing the company's name into disrepute carried a recommended sanction of dismissal or a final written warning for a first offence depending on the nature and circumstances of the case.

[13] The arbitrator followed the guidelines for deciding the fairness of a dismissal set out in the schedule 8 of the Labour Relations Act, 66 of 1995 (' the LRA'). The arbitrator's main findings may be summarised as:

13.1 in the absence of stating the reason why the resources were improperly used the charge was insufficiently detailed for the third respondent to prepare for the hearing;

13.2 because there was no evidence of an IT policy tendered during the arbitration and as the employer conceded that there was no written rule regulating the conduct in question, the employer failed to prove that there was a rule which existed that prohibited employees from sending private emails of a sexual nature using company resources;

13.3 there was no evidence to support a conclusion that the company's reputation had been brought into disrepute;

13.4 the employer had been lenient in relation to the transmission of jokes by email which could also contain content of a sexual nature, which was difficult to distinguish from the conduct of the third respondent as such communications also amounted to the private use of company resources;

13.5 the charge sheet did not indicate the reason for stating why resources had been used improperly and accordingly was too vague for Botha to prepare for his enquiry.

[14] Accordingly, the arbitrator concluded that the private use of the company's email resources was not prohibited, nor was there any rule prohibiting the improper use thereof and consequently no rule that was broken and his dismissal for misconduct was unfair. She also concluded that his dismissal was procedurally unfair. The arbitrator went on to consider that the third respondent had a clean disciplinary record and that there was evidence that the trust relationship remained intact and decided that reinstatement was appropriate.

Grounds of review

Alleged bias on the part of the arbitrator

[15] The applicant complains that the arbitrator failed to disclose "the close friendship between her and the employee's legal representative" at any stage before or during the arbitration proceedings. Botha's attorney confirmed that he and the Commissioner did not have a close friendship but merely knew each other as colleagues in Rustenburg on a professional basis. The applicant seeks to attach some significance to the fact that the arbitrator herself did not file an affidavit rebutting the unsupported allegation of its own representative Mr Khonou impugning her integrity. Mr Khonou provided no support or objective basis for his own belief or opinion which was baldly stated in his founding affidavit in the following terms:

> *"I have also since ascertained that the Commissioner and the employee's legal representative of friends. The Commissioner failed to disclose this relationship to me before or during the arbitration proceedings."*

[16] It appears to me that the confirmatory affidavit of Botha's attorney of record was more than adequate in dealing with Mr Khonou's vague and unsupported allegation. It also would be somewhat surprising if professionals in the labour law community of a town the size of Rustenburg were not reasonably familiar, or even well acquainted with each other, but without more such an association does not warrant a justifiable perception of bias requiring disclosure.

Adverse cost award

[17] The applicant also complains that the arbitrator committed a reviewable irregularity in unreasonably awarding Botha his costs on the basis that it had been frivolous and vexatious in defending the matter. The arbitrator did not in fact find that the applicant had been frivolous or vexatious in defending the case, but found that the applicant had not acted in good faith in the way it had conducted the proceedings. In particular, the arbitrator appears to have taken the view that the matter had been postponed for evidence to be led but the applicant had been remiss in making sure that all its witnesses were in attendance and instead made submissions in argument which should have been the subject matter of evidence.

[18] I do have some difficulty in understanding the arbitrator's approach in this regard, but it is not sufficient to indicate a basis for a real apprehension of bias as the applicant suggests. It would appear that the arbitrator awarded costs against the applicant not because Botha was forced to incur additional costs, which he would have incurred if a postponement had been granted, but because the applicant did not ensure that it was in a position to present all its evidence when the arbitration reconvened on the second occasion. On the face of it, in the absence of any undue prejudice to Botha in the form of incurring unnecessary legal costs, in circumstances where she was also reinstating Botha, it is difficult to find that the arbitrator exercised their discretion in a judicious manner when making a cost order against the applicant. Consequently, I believe this part of her award should be set aside, quite independently of my overall finding.

Merits of the award

[19] The applicant contends that the Commissioner decided Botha's dismissal was substantively unfair because he had been dismissed, whereas two other employees he had named had not been dismissed. However, it is not evident on the face of the award that this was the basis for the arbitrator's decision. Although the arbitrator recorded Botha's evidence about other employees who had not been dismissed, the only comparison she alluded to in her analysis was to the fact that there was evidence of other personal messages containing jokes being sent using

the applicant's email, and that to her these seemed indistinguishable in principle from the type of message sent by Botha. What she could not reconcile was why the applicant appeared to regard such emails as acceptable but found the sexual content of Botha's emails so objectionable. This informed her conclusion that the applicant had failed to prove the existence and contravention of a rule by Botha. I agree therefore that the arbitrator did not base her finding of unfairness on the inconsistent application of a rule about pornographic material on company computers as such, but her perception of inconsistency in relation to the content of private emails on the company server was a significant factor in her thinking. Here the relevance of how the company distinguished the relative seriousness with which it viewed the content of such emails is apparent and would have to have been canvassed with the applicant's missing witness if he had testified.

[20] The employer also claims that the arbitrator failed to consider that Botha had shown no remorse during the arbitration or disciplinary proceedings in maintaining that he had not contravened the applicant's IT policy or brought its name into disrepute. Had the arbitrator considered these factors she would have concluded that his dismissal was substantively fair. While Botha did not express remorse in these specific terms he had expressed his regret at the disciplinary enquiry that he had used the company resources for a private matter but that he understood it was not uncommon to do so at the mine. On the face of it, that is not indicative of a refusal to accept that it was inappropriate, but simply a statement of what he believed at the time. On the evidence, there was also no reason why he ought to have expressed remorse for bringing the company's reputation into disrepute when there was no evidence that he had done so. No doubt this is an issue that the applicant's missing witness would also have been compelled to address in dealing with why it considered Botha's conduct in such a serious light, but in the light of the arbitrator's postponement ruling this was not canvassed.

[21] Thirdly, the applicant claimed that the arbitrator had adopted an overly technical approach in finding that Botha's dismissal was procedurally unfair given his seniority, and level of education. The applicant contended that it is inconceivable that Botha could not appreciate the substance of the charge against him namely

"that he had sent a pornographic email to the third party on the applicant's server". The arbitrator's conclusion that the charge was vague was not unreasonable since it is entirely lacking in any factual specificity. However, Botha did not actually give any evidence as to how it hampered his defence. His defence was based on the fact that he believed private emails were perfectly acceptable and he was not aware how his emails could have brought the company into disrepute. Consequently there does not seem to have been any evidence to show that he had been hampered or hindered in his ability to respond to the applicant's case or to mount his own. In the circumstances, I think it is fair to say that the arbitrator's finding of procedural unfairness was not warranted on the evidence before her and her finding in this regard should be set aside, irrespective of my overall findings.

The 'Refusal' of Legal Representation

[22] The applicant contended that it should have been afforded legal representation after the arbitrator's ruling on this issue and her failure to do so amounted to gross irregularity in the conduct of the proceedings as contemplated in section 145 (2) (a) (ii) of the LRA.

[23] Why the applicant makes this allegation is a mystery. There is no indication on the face of the transcript that it was refused legal representation at any stage during the proceedings after the arbitrator agreed that Botha could be legally represented. It is true that during his submissions the applicant's representative said that if Botha was afforded legal representation, he would like legal representation as well. However, when the arbitrator handed down her ruling all she said was that she would allow legal representation in the matter. There was nothing to suggest that she thereby sought to exclude the applicant from bringing a legal representative on the next occasion when the hearing resumed a week later. If the applicant's representative had any cause for being unclear about this, he made no attempt to clarify the same with the arbitrator. Moreover, he had plenty of time to consider his options between the date the ruling was made on 11 June 2012 and when the arbitration hearing resumed on 19 July 2012. Consequently, this ground appears to be without any factual basis.

The Postponement Ruling

[24] The applicant contends that the Commissioner improperly refused the application for postponement thereby preventing it from relying on a material witness, Mr A Mbule, who would have testified on the question of the inconsistent application of discipline and the alleged breakdown in the trust relationship. The applicant sought to emphasise the importance of not being able to lead evidence to rebut the claim of inconsistent treatment because the Commissioner had made a finding that discipline had been inconsistently applied. In elaborating on this ground of review the applicant claimed that its witnesses would have shown that it had not acted inconsistently because Botha had disseminated particularly offensive pornographic material (which was before the arbitrator already), that he had shown no remorse and that the applicant viewed such conduct as a dismissible offence. It is true that the applicant had made an issue of other employees who had been found with offensive pornographic material on their computers, but had not been dismissed. However, the arbitrator did not base her finding of substantive unfairness on such claims. Accordingly, it is arguable that even if the employer's missing witness had testified in rebuttal of Botha's claims of inconsistent treatment, this would not have materially affected the outcome of the award, given the arbitrator's non-reliance on Botha's claims in this respect.

[25] It is apparent from the transcript of the proceedings that no attempt was made by the applicant's representative at the time of requesting the postponement to explain why it was important to lead the evidence of the further witness, nor was his identity mentioned. Thus, none of the motivation now provided on review of the need to call an additional witness was placed before the arbitrator at the relevant time, even if motivation was apparently provided later when the employer made its closing submissions at the arbitration. When Botha pointed this omission out in his answering affidavit, the applicant then stated in its replying affidavit that this had been conveyed to the Commissioner and Botha's legal representative during an adjournment in the proceedings, which seems somewhat improbable as it is an explanation offered only in reply. The applicant contends that a vague reference by the arbitrator to the effect that he had advised the arbitrator that his witness was

not there and he was seeking a postponement was proof that this conversation had taken place. It may be that it indicates a conversation took place, but not that he had motivated why he needed the witness during that conversation. In any event, the arbitrator herself appears not to have made any effort to enquire into the relevance of his potential evidence.

[26] In addition, it must also be said that the explanation provided at the hearing for the failure of the witness to attend involving as it did an email based solely on an SMS message received by the employer's representative earlier in the morning, with a complete absence of communications thereafter and a generous allowance of time being made for him to appear, raise a number of unanswered questions and doubts.

[27] Can it be said in the light of this that the applicant denied the applicant party a full opportunity to have its say in respect of the dispute?[1] The main difficulty on the record is that in the absence of ascertaining the nature of the evidence the witness was to give, the arbitrator could not reasonably evaluate the relative prejudice to the applicant of the witness not testifying. Secondly, her reasoning that the applicant should have *subpoenaed* the witness and, in the absence of doing so, must suffer the consequence thereof is difficult to understand given the limited evidence before her at the time. At that time, there was evidence that the witness had been *en route* and had sent an SMS he had been detained at a roadblock. In other words there was nothing on the evidence to suggest that the applicant had

[1] See ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 943 (LAC)**, at 950, para [20] where the LAC said, *inter alia*, :

> "*The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) C (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?*"

not arranged for him to attend, or that it would have seen the need to issue a *subpoena* as well, or even that a s*ubpoena* would have been any more likely to have ensured his attendance if an event beyond his control had possibly prevented him arriving. The skepticism of the arbitrator about whether his non-appearance was owing to a genuine reason or not, is understandable given the lengthy delay and the absence of further communication, but she ultimately favoured speculation about the reason for his non-appearance over the limited information available to her. She also did not consider whether the prejudice to Botha could not be balanced by an appropriate cost award, even when the applicant's representative offered to meet his costs, *albeit* that this offer was made immediately after the ruling. It is a rudimentary and basic consideration the arbitrator should have weighed up in the course of making her ruling.

[28] Can it be said that the failure to give the applicant a chance to lead Mbule's evidence defeated the constitutional imperative that the award must be rational and reasonable?[2] It is true that Mbule's evidence in chief might have focussed on trying to explain the apparent inconsistent treatment of two other employees who were not dismissed despite having pornographic content on their computers, which one might reasonably assume would also have amounted to an improper private use of company resources. But he was also going to testify on why the company believed Botha's conduct was serious enough to warrant dismissal, which the applicant's first witness could not testify to. Although it is somewhat difficult to see how Mbuli would have been able to offer a persuasive justification for the employer's stance in the light of the rest of the evidence, it was certainly testimony that ought to have been heard because it would have been very relevant to the outcome. It might also have raised issues the arbitrator did not consider because it was excluded. For example, Botha's attorney would have had to confront Mbuli with the more tolerant treatment apparently afforded to some private email material, which the arbitrator had placed much emphasis on, and it would have

[2] See *Gold Fields* at 950, para [21]

been important to get his response to that as a supposed spokesperson on company policy.

[29] In the circumstances, I am not confident the award can be said to be rational or reasonable given the failure to provide an opportunity to hear this evidence on account of adopting the incorrect approach to handling the postponement application.

Conclusions

[30] In the circumstances, despite doubts about the applicant's ultimate prospects and despite the time which has elapsed, the award must be set aside to permit the additional evidence of Mbule and any evidence in rebuttal thereof to be entertained.

Order

[31] The second respondent's arbitration award dated 2 August 2012 under case number NWRB882/12 is reviewed and set aside.

[32] Within 30 calendar days of receipt of this judgment, the first respondent must set down the matter for hearing before a commissioner other than the second respondent to consider the matter afresh on the basis of the record in the first arbitration hearing, including the emails referred to as B1, B2 and B3 on page 26 of the typed transcript of the arbitration hearing, which were missing from the record placed before the court, and after hearing the evidence of Mr A Mbuli and any evidence the second respondent may wish to lead in rebuttal thereof.

[33] The applicant's 'additional affidavit' filed on 12 July 2013 is not admitted as part of the record in the review proceedings.

[34] The parties must pay their own costs in the review save that the applicant must pay the third respondent's costs of opposing the admission of the affidavit on an attorney own client scale.

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R LAGRANGE, J

Judge of the Labour Court

Appearances:

For the Applicant: P G Seleka and L Oken

Instructed by: Webber Wentzel

For the Third Respondent: N Basson

Instructed by: Jacques Parsons Attorneys