Impala Platinum Ltd v Jansen and others[2017] 4 BLLR 325 (LAC)

Judgment

Waglay JP:

[1] This is an appeal against the judgment of the Labour Court (Basson J). The court *a quo* reviewed and set aside the arbitration award of the third respondent ("the commissioner") in terms of which the commissioner found the dismissal of the first respondent, the employee ("Jansen") to be fair. The reasons for the setting aside of the award were that (i) the employer ("the appellant") had not led evidence to show that the employment relationship between it and Jansen had broken down: and, (ii) thecommissioner displayed bias against Jansen in the conduct of the arbitration proceedings. The appellant is before this Court with leave of the court *a quo*.

[2] At the commencement of the hearing, the appellant sought the reinstatement of the appeal insofar as the appeal may have lapsed in terms of the Rules that govern proceedings in this Court. Leave to appeal was granted on 11 June 2014 and the appellant ought to have filed its notice of appeal within 15 days thereof. The appellant failed to do so and submitted that it only became aware of the judgment granting leave to appeal on 8 October 2014 when it enquired about the supplementary submissions it had filed. The principles relating to the nature of this application are now trite and there is no reason to restate them. There was no strenuous opposition to the application, suffice to say that the Court was satisfied with the explanation for the delay and saw no reason why the appeal should not be reinstated and made an order accordingly.

[3] Regarding the merits of the appeal, Jansen was employed as a Training Manager from 3 February 1983 until his dismissal for misconduct on 3 August 2007. The reasons for the dismissal are to be found in the promulgation of a 2002 ministerial regulation referred to as "Fall of Ground Regulations" ("the Regulations"). The aim of the regulations was to create and ensure a safe underground mining working environment. All mining companies (including the appellant) had therefore to ensure that workers rendering service in an underground mining environment had been practically and theoretically assessed and declared to be fit to render services in one of two categories – Competent A or Competent B. Each employer or any service provider accredited by the Mining Qualification Authority was responsible for the assessment of the competency test.

[4] The appellant requested and was granted an exemption, for a limited time, from compliance with the Regulations. This short-term exemption served to provide the appellant with the opportunity to train and certify those who work underground in its mine.

[5] At the expiration of the exemption period, the appellant was obliged to ensure that none of its employees or contractors' employees worked underground without having completed their training and being certified as either Competent A or Competent B. To this end, the appellant issued an instruction that before an individual renders services in the underground environment, he or she must have successfully completed the theoretical and practical components of Competent A or Competent B

certification. It is not disputed that Jansen was in charge and therefore responsible to ensure compliance with the instructions and the Regulations. Jansen however, contrary to the instruction ordered his subordinates to allow workers including those of its service provider, Vuselela, who had only completed the theoretical component of the competency certificate to work and/or train underground. This was after the exemption period. It then transpired that Vuselela was a business co-owned by Jansen's wife and his stepdaughter. The appellant, on investigating this issue further, discovered that Jansen exercised undue influence on service providers who providedservices to the appellants to make use of Vuselela's services for the provision of the competency training.

[6] Subsequent to the investigations at which Jansen was also questioned, the appellant charged Jansen with misconduct. The charges preferred included gross negligence in having allowed workers to perform underground duties without being declared competent; and, for non-compliance with company values, policies and procedure in creating a conflict of interest by unduly promoting the use of a company called Vuselela, owned by his wife, to train workers. Jansen was found guilty and dismissed at a disciplinary hearing. His internal appeal suffered similar fate.

[7] Unhappy with his dismissal, Jansen referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") challenging both the procedural and substantive fairness of his dismissal. In dismissing the procedural challenge, the commissioner found that viewed holistically, the procedure adopted by the appellant was fair because it gave Jansen full opportunity to state his case and he failed to attend the disciplinary hearing. Concerning the substantive fairness of the dismissal, the commissioner found that Jansen was grossly negligent in allowing Vuselela's employees to render services underground in the mines by instructing his subordinates to overlook that those workers were not certified to be underground as required by the regulations. The commissioner further found that Jansen's conduct was premeditated, deliberate and aimed at promoting his wife's business.

[8] Dissatisfied with the award, Jansen sought to have the award reviewed and set aside. As stated earlier he was successful. The court *a quo* reviewed the award on two bases: that the sanction was inappropriate because no evidence was led to the effect that the trust relationship had broken down as the result of Jansen's offence; and, that the conduct of the commissioner had created an impression of bias against Jansen. These are the two issues for consideration in this appeal.

[9] The first issue arises from the findings of the court *a quo* that the arbitration award was reviewable because after finding Jansen guilty of the misconduct complained of, the commissioner simply assumed that the trust relationship had broken down without the appellant leading any evidence to that effect. In the court *a quo*'s view, the fact that a commissioner finds an employee guilty of misconduct does not entitle him/her to uphold an employee's dismissal unless there is evidence presented by the employer that the relationship between them has broken down. According to the court *a quo,* it is peremptory for an employer to lead evidence relating to the breakdown of the trust relationship where an employee is found guilty of misconduct before s/he can be dismissed. The court *a quo* was of the view that this was expressed by the Supreme Court of Appeal ("the SCA") *Edcon Limited v Pillemer NO and others*[1] ("*Edcon*"). The court *a quo* held that *Edcon*laid down the principle that in

order for the sanction of dismissal to be appropriate, an employer must lead evidence to showthat there was a breakdown in the employment relationship. It then held that since the consideration of an appropriate sanction constitutes an important yet separate component of the arbitration process, the commissioner should not assume that the trust relationship had broken down without being presented with evidence as to what effect the misconduct had on the trust relationship between the parties. In its words, the *onus* rests on the employer to present evidence of the breakdown in the trust relationship. Moreover, the court *a quo* found that the commissioner failed to properly consider what would be an appropriate sanction because he did not take into account Jansen's 24 years of service coupled with his unblemished record.

[10] The court *a quo*'s reliance on *Edcon*was totally misconceived. That judgment turned on its own facts and did not establish as an immutable rule that an employer must always lead evidence to establish a breakdown in the trust relationship in order for the sanction of dismissal to be appropriate. An analysis of the judgment is perhaps necessary to contextualise its findings. There, the misconduct charge framed against the employee (Reddy) was as follows:

> "[Reddy] committed an act, which has affected the trust relationship between the company and the employee in that on 6 June 2003; you failed to report an accident [involving] a company vehicle . . . which your son was driving on the day of the accident . . . and this resulted in a breach of trust between yourself and the company"

The misconduct charge had its genesis in an incident in which Reddy's son had, while driving a vehicle issued to Reddy by her employer, been involved in an accident which Reddy did not report to her employer. Once the employer found out about the incident and approached Reddy, she was dishonest in her account of the incident but eventually admitted the allegations and "made a clean breast of everything". At the hearing, Reddy had presented letters from two of Edcon's managers in which she was described as a "very honest and hard-working lady" and Edcon was requested not to dismiss her as the authors wished to continue their working relationship with her. The thrust of the letters was that the trust relationship had not been destroyed, and accordingly, dismissal was not an appropriate sanction. The employer on the other hand led no evidence to show that the trust relationship had been destroyed.

[11] The SCA in *Edcon*formulated the dispute as follows:

> "The thrust of Edcon's case is that Pillemer [ie the commissioner] had ample material before her showing that the trust relationship between it and Reddy had been destroyed by Reddy's misconduct and lack of candour. This, it was submitted, showed that the decision to dismiss her was justified. The determinant issue in the appeal must therefore be whether the trust relationship . . . had been shown in the arbitration to have been destroyed. This calls for an examination of Pillemer's reasons for her conclusion and the material that was available to her in arriving at it."

The SCA then concluded that:

> "Pillemer was entitled and in fact expected, in the scheme of things, to explore if there was evidence by Edcon and/or on record before her showing that dismissal was the appropriate sanction under the circumstances. This was because Edcon's decision was underpinned by its view that the trust relationship had been destroyed. She could find no evidence suggestive of the alleged breakdown and specifically mentioned this as one of her reasons for concluding that Reddy's dismissal was inappropriate."

[12] In the circumstances, as correctly submitted by the appellant, *Edcon*is no authority for the proposition that in order to justify a decision to dismiss a senior employee who has committed serious misconduct, an employer must always lead specific evidence to prove that the trust relationship between them has been destroyed. *Edcon*turned on its own facts. In *Edcon*, the charge against the employee was that the employee had violated the trust relationship by being untruthful (which she later admitted). The charge specifically alleged that the trust relationship had broken down. The employee in her defence led evidence to show that was not the case, and, it was in these circumstances that the court concluded that evidence was necessary before the commissioner could make a finding of a breakdown of trust.

[13] Since *Edcon*, this Court has repeatedly stated that where an employee is found guilty of gross misconduct it is not necessary to lead evidence pertaining to a breakdown in the trust relationship as it cannot be expected of an employer to retain a delinquent employee in its employ.

[14] In *Anglo Platinum* (*Pty*) *Ltd* (*BafokengRasemone Mine*) *v De Beer and others*, the Labour Court set aside a commissioner's award on review because the employer had not led any evidence to establish the breakdown in the employment relationship. This Court reversed the decision on appeal and found the award reasonable despite the absence of the evidence in question. It upheld the commissioner because it found that:

> ". . . it is implicit in the commissioner's findings that in view of the nature of the offence, which involved deception and dishonesty and, in particular, the failure of the first respondent to demonstrate any acceptance of wrongdoing or remorse, he considered the employment relationship to be destroyed and dismissal an appropriate sanction."

[15] Also in *Absa Bank Limited v Naidu and others*, it was stated that "there are varying degrees of dishonesty and, therefore, each case is to be determined on the basis of its own facts on whether a decision to dismiss an offending employee is a reasonable one. Generally, however, a sanction ofdismissal is justifiable and, indeed, warranted where dishonesty involved is of a gross nature." This signifies that the nature of the misconduct may well determine the fairness of the sanction. It must therefore be implied from the gravity of the misconduct that the trust relationship had broken down and that dismissal is the appropriate sanction.

[16] Turning to the facts of this case, Jansen was dismissed for (i) allowing workers to perform underground duties without the necessary qualification in violation of the rules and procedures that regulate the minimum requirements for workers to perform underground duties; and, (ii) for *non-compliance with company values, policies and*

procedure in creating a conflict of interest by promoting the use of a business owned by his wife in circumstances that, at worst, points to possible corruption and/or, to nepotism at best.

[17] Concerning the offence of contravening the rules and procedures levelled against Jansen, it is clear that the mining industry has been under tremendous scrutiny regarding safety measures due to the high risk in the nature of the work done. In order to have a safe mining environment, the regulations which were contravened by Jansen were promulgated to ensure that workers doing underground work underwent competency training, and declared competent before being allowed to do underground work. By his actions Jansen did not only undermine the regulatory framework and put in danger life and limb, he also placed his employer at risk of sanction for contravening the statutory regulations.

[18] The nature of the misconduct was indeed gross and was aggravated by the fact that some of the workers who were allowed to train or give training underground for and on behalf of Vuselela were formerly dismissed employees of the appellant. Jansen was aware of the rule that an employee dismissed by the appellant was not allowed to be employed at the appellant's site *albeit* via another agency or contractor. Jansen nevertheless allowed this rule to be contravened. This is further compounded by the fact that the contractor company whose employees were working without the necessary certification was owed by Jansen's wife. As found by the commissioner, the overwhelming evidence showed that Jansen gave preference to his wife's business enterprise. This was in clear breach of his duty to further the interests of the appellant. Added to this, Jansen displayed no remorse. His misconduct, taking into account his seniority, was indeed grave. His 24 years of service and unblemished disciplinary record, while a mitigating factor, cannot come to his assistance because, as stated by this Court in *Toyota SA Motors* (*Pty*) *Ltd v Radebe and others:*

> ". . . Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of themfrom dismissal. To my mind one such clear act of misconduct is gross dishonesty . . ."

[19]As held in *G4S Secure Solutions* (*SA*) (*Pty*) *Ltd v Ruggiero NO and others*, an "employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is "a sensible operational response to risk management". In a recent and as yet to be reported judgment of *Schwartz v Sasol Polymers and others*, this Court dealt with the case of an employee found guilty of conflict of interest in that his wife had received gifts from several of his employer's service providers. Unlike in this matter, the commissioner there found the employee's dismissal to be substantively unfair. In setting aside the award, this Court (upholding the Labour Court judgment on substantive fairness)

held that the dishonest nature of the employee's misconduct was of such a nature as to make continued employment intolerable. It further held that it would be fundamentally unfair and unjust to expect an employer to retain in its workplace a senior employee who has shown himself to be guilty of dishonesty.[17] The court also took the view that if the employee was remorseful, the nature of the dishonesty was such that these mitigating factors could not help in mitigating the harsh sanction of dismissal. In this respect, the court held that:

> "While I agree . . . that the lack of remorse shown by appellant is relevant, even if genuine remorse had been shown by him, this would only have been a factor to be considered in his favour in determining sanction and would not have barred his dismissal, remorseful or not, having regard to the seriousness of the misconduct committed."

[20] The commissioner rightly found that Jansen's conduct went to the root of the employment relationship deserving of the severest sanction. This cannot be faulted. In fact, it would be unfair to expect the appellant to retain Jansen in its employ where Jansen had not only displayed gross misconduct in failing to comply with statutory regulations but also contravenedthe duty to act in good faith by promoting his wife's business to appellant's service providers thereby compromising fairness and honesty within the appellant's business relationships. In the circumstances, there was no need to lead any evidence of a breakdown in the relationship, as it was obviously the case. This ground of appeal thus succeeds.

[21] Turning then to the issue of bias: the court a *quo*'s findings in regard to the issue of bias was that the commissioner on various occasions elicited evidence which was beneficial to the appellant in the process of questioning witnesses, and thereby created a reasonable suspicion of bias. The court *a quo* stated:

> "The commissioner in this matter has, despite the fact that both parties were legally represented, descended into the arena in a manner that gave rise to a suspicion of bias. I am persuaded in light of the numerous examples pointed out to the Court that the arbitrator [commissioner], when descending into the arena, elicited evidence from witnesses which he deemed would be beneficial to Impala's [the appellant's] case and that he cross-questioned [Jansen] and [his] witness in such a manner that . . . adduced evidence, likewise which he deemed to be beneficial to Impala's case . . . I am persuaded in light of the numerous examples . . . that the commissioner inquisitorial interferences gave rise to a reasonable apprehension on the part of [Jansen] (a layperson) that the commissioner was incapable of bringing an objective mind to bear on the matter, therefore having deprived [Jansen] of a fair hearing in contravention of sections 23 and 34 of the Constitution read with section 188 of the LRA. I am satisfied that the conduct of the commissioner in conducting this case may reasonably have created an impression of bias. Consequently, this conduct on the part of the commissioner rendered the arbitration process fundamentally flawed."

[22] An arbitration conducted in terms of the Labour Relations Act 66 of 1995 ("LRA") must not be equated with the processes in a civil court. It is not a civil trial but a process governed by section 138 of the LRA, which provides:

"(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner."

[23] Section 138 gives the commissioner a discretion as to the form of the proceedings and the manner in which the proceedings are conducted. The Act prescribes that the commissioner must deal with the substantial merits of the dispute with the minimum of legal formalities. The Act envisages the role of the commissioner to be more investigative than adversarial. This is less formal and should provide an expeditious access to justice. Section 138 therefore sets out two essential requirements: (i) that thecommissioner must conduct the proceedings in a manner that the commissioner considers to be appropriate in order to determine the dispute fairly and quickly (ii) that the commissioner does so with the minimum of legal formalities.

[24] A commissioner has relative *carte blanche* to conduct the proceedings with the minimum of legal formalities in an inquisitorial or investigative mode. He or she is entitled to solicit information himself/herself in order to come to a finding that is fair. This would also means that a commissioner who adopts an adversarial approach to the proceedings must not simply sit back and not interfere or solicit any information from a witness. S/he is entitled to do so, more so if s/he believes that certain issues are not sufficient clear and where he/she is of the view that s/he requires more information. Seeking clarity is a right of any presiding officer, otherwise how else would s/he come to a just finding?

[25] In the circumstances, commissioners are entitled in terms of section 138 to question witnesses. Whereas in formal civil proceedings an irregularity may arise from a presiding officer entering the fray, commissioners conducting arbitration proceedings, are in fact, in my view, entitled to adopt an inquisitional approach, which necessarily affords them greater latitude to question witnesses. Such questions need not be limited to obtaining clarity on any issues, but entitles the commissioners to ask questions of an investigative nature. This is so even where the parties are legally represented and a largely adversarial process is adopted. The entitlement to so enter into the fray comes from the duty imposed on the commissioner to "determine the dispute fairly and quickly…with the minimum of legal formalities."

[26] In this matter, the commissioner adopted a mixture of an adversarial and an inquisitional approach. While he did ask a number of questions, a holistic assessment of the transcript evinces that he was even-handed and questioned most of the witnesses, regardless of the stage of the proceedings, whether they were presenting evidence in chief or under cross-examination, for the appellant or for Jansen. More importantly, most of the questions were meant to obtain clarity on the evidence already presented. It cannot therefore be said that his entering into the fray

was in any way prejudicial to either of the parties insofar as getting a fair hearing is concerned.

[27] Jansen's further argument on the apprehension of bias is that the commissioner did not question the parties' witnesses in equal proportions. This argument is devoid of any merit. I fail to see how posing the same number of questions to each of the party's witnesses can display or dispel the notion of bias.

[28] Seeking to establish a reasonable perception of bias, Jansen quoted extensively from the transcript of the proceedings, selecting each instance where, read in isolation, the commissioner's questions appear to haveelicited answers from the witnesses which were adverse to Jansen. This approach is misguided. Portions of a record, when viewed superficially or in isolation, do not provide a full picture of what transpired. Regard must be had to the entirety of the record, particularly the context within which the answers were solicited. As I stated earlier, considering the questions asked by the commissioner in the context of the arbitration, it is obvious that the questions were aimed at obtaining clarity and reconciling aspects of the evidence already presented.

[29] The commissioner was, on a holistic consideration of the record, even-handed and consistent in his approach in relation to questioning witnesses. He did not seek to undermine Jansen's case in soliciting the information he did. There is in the circumstances, no basis on which to conclude that a reasonable apprehension of bias arose.

[30] The final point I make in this regard is that Jansen was legally represented at the arbitration and neither raised an objection to the commissioner's approach nor applied for his recusal.

[31] I am, therefore, satisfied that the appeal must succeed. There is also no reason why costs should not follow the result.

[32] In the result, the following order is made:

1. The appeal is upheld with costs.
2. The order of the Labour Court is set aside and replaced with the following order:

"The review application is dismissed with costs".
(Musi JA and Makgoka AJA concurred in the judgment of Waglay JP.)

For the appellant:
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For the first respondent:
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Footnotes
1[2010] 1 BLLR 1 (SCA).
2*Edcon*at para [6].
3At para [17].
4At para [22].

5*Schwartz v Sasol Polymers and others* case number JA46/14 delivered on 5 October 2015 at para [30]; *G4S Secure Solutions* (*SA*) (*Pty*) *Ltd v Ruggiero NO and others* case number 2/15 delivered on 25 November 2016 at para [30] [also reported at [2016] JOL 37028 (LAC) – Ed]; *Department of Home Affairs and another v Ndlovu and others* at para [17]; *Absa Bank Limited v Naidu and others* [2015] 1 BLLR 1 (LAC) at para [52].
6[2015] 4 BLLR 394 (LAC).
7At para [19].
8[2015] 1 BLLR 1 (LAC).
9At para [52].
10[2000] 3 BLLR 243 (LAC).
11At para [15].
12Case number CA 2/15 delivered on 25 November 2016.
13At para [26] and see also *Sappi Novoboard*(*Pty*) *Ltd v Bolleurs*(1998) 19 ILJ 784 (LAC) at para [7] [also reported at [1998] 5 BLLR 460 (LAC) – Ed]; *CSIR v Fijen*[1996] 6 BLLR 685 (AD) 691; *Murray v Minister of Defence* [2008] 3 All SA 66 (SCA); [2008] 6 BLLR 513 (SCA); 2009 (3) SA 130 (SCA); 2008 (11) BCLR 1175 (SCA); (2008) 29 ILJ 1369 (SCA) at para [6].
14*Miyambo v CCMA and others* [2010] 10 BLLR 1017 (LAC); (2010) 31 ILJ 2031 (LAC) at para [16]; *Toyota SA* (*Pty*) *Ltd v Radebe supra;* and *HulettAlluminium*(*Pty*) *Ltd v Bargaining Council for the Metal Industry* [2008] 3 BLLR 241 (LC) at para [42].
15*De Beers Consolidated Mines Ltd v CCMA and others* [2000] 9 BLLR 995 (LAC) at para [22].
16Case number JA46/2014 delivered on 5 October 2015.
17At para [30].
18At para [24].
19Para [13] of the judgment of the court *a quo*.
20See Clark “Arbitration in Dismissal Dispute in South Africa and the UK” (1997) 18 ILJ 609 at 610.
21*Naraindath v Commission for Conciliation, Mediation and Arbitration and others* [2000] 6 BLLR 716 (LC) at para [26].