THE LABOUR COURT OF SOUTH AFRICA,

JOHANNESBURG

Not reportable

Case no: JR 948/14

In the matter between:

ASSMANG LIMITED (BLACKROCK MINE) Applicant

and

LEON DE BEER First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

GERALD JACOBS *N.O* Third Respondent

Heard: 8 August 2016

Delivered: 28 February 2017

Summary: Review Application. Employee dismissed for failing to declare previous neck injury when completing medical form.

Employer's representative failing to present any evidence under oath and failing to call any witnesses, despite bearing onus to prove that dismissal was fair – no matter how crucial or self-evident a document may seem to be, can only have

evidentiary value relevant to extent to which document is contextualised by witness who talks to document in question.

Reinstatement of dismissed employee. Where employer fails to prove that it had fair reason to dismiss employee, it cannot then shift burden onto employee and require employee to prove that he should be retained in employment. Although breakdown of trust relationship may be implied from nature of disciplinary offence, without need for employer to lead evidence, this can only happen where employer has of necessity first proven that employee was guilty of gross misconduct – gross misconduct not proven – complete absence of evidence to that effect – nothing to therefore imply a resultant breakdown in trust relationship that would make it inappropriate or intolerable for employee to be reinstated.

Helping hand cases. Test set out in *Bafokeng Rasimone Platinum Mine* followed – nothing to suggest that employer's representative was out of his depth, that he did not understand process and what was required of him at arbitration – employer wilfully and consciously elected not to call any witnesses despite arbitrator having specifically asked this question.

HELD that no grounds exist to review and set aside arbitration award – review application dismissed with costs.

JUDGMENT

FERREIRA AJ

[1] This is an application to review and set aside the arbitration award of Third Respondent dated 31 March 2014, wherein he found that it had been substantively unfair to dismiss First Respondent. Applicant ('the Blackrock Mine') dismissed First Respondent, a fitter and turner, after having charged him with misrepresentation,

more specifically in that First Respondent failed to declare a previous neck injury when he completed a "pre-placement medical" form during July 2012. First Respondent was subsequently hired by Applicant and commenced his employment at the mine approximately four months later, during November 2012. The alleged misrepresentation only came to the attention of Applicant during August 2013, which led to the employee's eventual dismissal during about September 2013.

[2] Applicant has raised two grounds of review, both of them predicated on the accusation that Third Respondent arrived at a conclusion which no reasonable decision-maker could have reached: firstly, in finding that the employee did not fail to disclose a pre-existing medical condition to Applicant before commencing employment (the first ground of review); and secondly, in finding that reinstatement was the appropriate remedy in the circumstances (the second ground of review).[1]

[3] Third Respondent's finding that First Respondent did not fail to disclose a pre-existing medical condition, and his resultant reinstatement award, were arrived at in circumstances where Applicant's representative at the arbitration, a Mr Leonard Markus, failed to present any evidence under oath and failed to call any witnesses for Applicant at the arbitration, despite Applicant bearing the onus to prove that the dismissal was fair. During the hearing of this matter, Mr Van As, for the Applicant, correctly conceded that Applicant's case, as it was presented at the arbitration, left "a lot to be desired". It is, therefore, understandable that Applicant sought to raise a further argument for this Court to consider: namely that Third Respondent was deficient in not having ensured that Mr Markus traversed the evidence which he was required to lead. This line of argument, intended to supplement the above two grounds of review, is based on the so-called "helping hand" cases. As argued by Mr Van As, the Arbitrator was under an obligation to warn Mr Markus of the need to lead evidence and to assist him in that regard. It was argued that the Arbitrator should have ensured that Mr Markus led evidence so as to prove that it would be reasonably impracticable and/or a breach of applicable mining occupational health and safety legislation to employ First Respondent, as this was ostensibly most pertinent to the dispute being considered.

[1] Para 3 of Applicant's Heads of Argument.

Was it unreasonable for the Arbitrator to find that the employee did not fail to disclose a pre-existing medical condition?

[4] Before answering this question, it should be pointed out that First Respondent was expressly dismissed for alleged misrepresentation, specifically having been accused of failing to declare his "previous neck injury". This was the charge contained in the notice to attend the disciplinary hearing.[2] This is distinguishable from a failure "to disclose a pre-existing medical condition", as formulated for the purpose of Applicant's first ground of review. The distinction might seem irrelevant, overly technical or academic at first glance, until one realises that the employee's case is that, although he certainly did have a neck operation during 2005 (approximately seven years before completing the medical form) and he was admitted to hospital (which fact he did disclose to Applicant in the medical form), for a period of three days during 2005, the employee's evidence was that he did not, in fact, have any injury to his neck by the time he completed the medical form during 2012. In other words, the employee's case is that the operation (and the passage of time) sorted out whatever injury may have required the operation to his neck and so there was no *pre-existing medical condition* that required disclosure by the time the medical form was completed. By contrast, Applicant's first ground of review is premised (and its dismissal of First Respondent was premised) on the factual assumption that the neck injury persisted in the form of a continuing "medical condition" which the employee was obliged to specify in writing on the medical form, beyond merely disclosing his prior admission to hospital.

[5] However one characterises the alleged misrepresentation (which was clearly alleged to be one of omission), the bottom line is that the Arbitrator did not find the employee guilty of any misconduct and found that it had been unfair for the employer to dismiss him in the circumstances. In order to determine whether or not these were unreasonable findings to make, one must weigh up the evidence that was placed before the Arbitrator.

[2] See page 1 of Bundle A.

[6] The evidence that was led under oath before the Arbitrator was that the employee did not specify *the reason* for his hospital admission on the form (although he did disclose the admission itself) as there was no space on the form to elaborate in that regard. He did, however, verbally disclose his previous neck operation to one of the Applicant's medical staff who was present when he completed the form and she advised him that it was not necessary to disclose that level of detail, as that information concerning his neck operation was already on file with the Applicant. This stemmed from the fact that the employee had previously rendered his services to Applicant ('Assmang') in 2006 (the year following the neck operation) and so the neck operation had already been disclosed on that previous occasion.[3] The evidence was therefore that Applicant already had those details on file when the employee completed the medical form during 2012.

[7] This evidence was confirmed under oath by Dr HTE Bohnen,[4] who was the occupational medical practitioner at the Blackrock Mine during the period 2006 to 2012. Dr Bohnen crucially testified that he had been aware of the employee's neck operation, that Applicant's medical staff were aware of the employee's medical history,[5] that Applicant had been aware of the neck operation,[6] and that the neck operation had been disclosed in a "periodic medical examination" form dating from 2006 (when the employee previously rendered his services to Assmang).[7] Dr Bohnen testified that the company was required to keep such medical information on file for at least 40 years, thereby suggesting that this written disclosure of 2006 continued to be accessible to Applicant even in 2012. The weight of the evidence, as testified *inter alia* by Applicant's own occupational medical practitioner at the relevant time, was that Applicant's medical staff were already aware of the neck operation, that they therefore advised First Respondent not to specify it on the one page form, and that there was therefore no wrongdoing on the part of First Respondent. This ties in with the point already made above, that there was, in any event, no recurring or continuing *neck injury* or "existing medical condition" that required detailing to the extent subsequently argued by Applicant. None of this

[3] See page 56 of the CCMA Record.
[4] A medical professional in his field with more than 24 years' experience.
[5] See page 48 of the CCMA Record.
[6] See page 51 of the CCMA Record, lines 4-13.
[7] Page 7 of Bundle A.

evidence was, or could be, controverted by Applicant at the arbitration, since no evidence was led and no witnesses were called in support of Applicant's case.

[8] Mr Markus appears to have pinned all of his hopes of proving that the dismissal had been fair on an interpretation of the pre-placement medical form itself, but without leading any evidence to support his interpretation of that form. It is trite that documents which a party seeks to rely on for the purpose of legal proceedings, no matter how crucial or self-evident a document may seem to be, can only have evidentiary value relevant to the extent to which they are contextualised by a witness who talks to the document in question. Although an examination of the pre-placement medical form may, in the absence of anything else, reveal that the employee failed to provide "complete details" concerning *why* he was admitted to hospital, contrary to the instruction contained in the form, it does not explain why the employee did not do so (which First Respondent did explain under oath) and it does not reveal whether there was any wrongful intention to deceive (which First Respondent testified there was not) and it does not reveal whether, if there was a misrepresentation, it was something material. To the extent to which Applicant dismissed First Respondent for misconduct, all of these various considerations should have been addressed by Applicant, in order for Applicant to be able to prove that the dismissal was fair. It is not sufficient to, by way of inference, merely point out that the employee failed to properly complete a form and then expect the CCMA (or this Court) to assume that such error of technicality must automatically amount to a material misrepresentation therefore justifying the employee's dismissal, but without leading any actual evidence to that effect.

[9] If one compares the weight of evidence on the one hand with the lack of contrary evidence on the other hand, then it cannot be said that Third Respondent arrived at a conclusion which no reasonable decision-maker could have reached in finding that the employee did not fail to disclose a pre-existing medical condition to Applicant. Indeed, if the Arbitrator had found that there had been a wrongful misrepresentation on the part of the employee, despite no evidence of that having been presented, then that surely would have been a finding which no reasonable decision-maker could have reached on the evidence.

[10] Based on all of the aforegoing, there is no basis to support Applicant's first ground of review.

Was it unreasonable to reinstate First Respondent in the circumstances?

[11] In relation to the second ground of review, Applicant submitted that Third Respondent "completely disregarded the employee's failure to lead evidence that his pre-existing medical condition… was not sufficiently serious so as to prevent him from performing his duties and responsibilities as a fitter and turner."[8]

[12] Applicant goes on further to say that "the employee should have, at the very least, satisfied the Commissioner that his pre-existing medical condition [a previous neck operation] would not prevent him from henceforth performing his duties and responsibilities as a fitter and turner."[9]

[13] This line of argument is unconvincing for a number of reasons.

[14] In the first instance, this argument ignores the fact that where an employer chooses to dismiss its employee for misconduct reasons, the employer is the one who then bears the onus to prove that the dismissal was fair. As already pointed out above, the fundamental problem of Applicant's case is that it failed to prove anything to justify its dismissal of First Respondent and therefore failed to discharge its burden of proof. In circumstances where an employer fails completely to show that it had a fair reason to terminate the employment of an employee, it cannot then, by way of intellectual sleight of hand, shift the burden onto the employee and require that employee to prove that he should be retained in employment.

[15] If one considers the actual evidence that was led, this was to the effect that there was no continuing neck injury.[10] More pertinently, in response to Mr Markus' cross-

[8] As argued at paragraph 22 of Applicant's Heads.
[9] Paragraph 23 of Applicant's Heads.
[10] See page 66 of the CCMA Record, lines 27-28.

examination, Dr Bohnen testified that, even if there was a neck injury, in his professional opinion, it would not detrimentally affect the duties of a fitter and turner, in particular that person's capacity to pick up heavy objects.[11]

[16] The reality is, therefore, that evidence was led to the effect that, even if the employee had been suffering from a continuing neck injury, this would not affect his capacity to perform his duties as a fitter and turner. This evidence, presented under oath by an experienced medical professional who was the occupational medical practitioner for the Blackrock Mine for the period 2006 to 2012, was not disputed by Applicant and Applicant did not present any evidence showing that the employee suffered from a condition that should preclude Applicant from employing him. In fact, Applicant, at the arbitration, conceded that First Respondent was medically fit. At page 42 of the CCMA Record Mr Markus says the following:

> "What is not in dispute is Mr De Beer was medically fit and that is why he was appointed. …Mr De Beer was declared fit. …Yes. So that is not in dispute…".[12]

There can therefore be no medical reason, in the face of this evidence, why First Respondent should not retain his employment.

[17] Although passing references were made in the arbitration and in these proceedings to the ostensible legislative limitation placed on Applicant by the mining health and safety legislation, no attempt whatsoever was made to point out to this Court which specific statutory provision or provisions would apply to First Respondent in the present circumstances and where it is common cause that he is, in any event, medically fit, as indicated above.

[18] If the failure to refer this Court to applicable legislation was merely an oversight on the part of Applicant, and such legislation would truly preclude First Respondent from being able to render his services to Applicant, then the correct course of action

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[11] Page 53 of the CCMA Record, lines 13 – 26.
[12] Lines 1 – 11.

would be to deal with such a situation by complying with our law on employee incapacity, particularly in circumstances (such as the present) where no misconduct was committed by the employee.

[19] The only question which remains unanswered is the following: it was not disputed that First Respondent rendered his services to Applicant (Assmang) during 2006 and this was after the neck operation took place in 2005. Why then was the First Respondent's medical condition and its attendant legal ramifications not an issue then, yet this is presented to be an insurmountable bar to his reinstatement at this point in time?

[20] The only remaining basis upon which it could be argued that it would be inappropriate to reinstate the employee would be a breakdown of the trust relationship between the parties. No evidence was led to show that the employee was dishonest, that he had been deceptive or that he acted in bad faith in any form or manner. The only evidence that was led pointed to the contrary. The employee did disclose the fact that he had an operation. If the employee's intention had been to deceive the employer, then why provide a partial disclosure, since it would have been more likely than not for the employer to query the reason for the hospital admission during the four months between the completion of the form and the commencement of employment, especially if the document and its contents were indeed so material to, and determinative of, the existence of the employment relationship, as subsequently argued by the employer.

[21] Although in this case the employer did not lead any evidence to prove that the trust relationship had broken down, this Court is mindful of the Labour Appeal Court's recent Judgment in *Impala Platinum Limited v Zirk Jansen & others*.[13] Although that Judgment accepts that the breakdown of the trust relationship may be implied from the nature of a disciplinary offense and it may, therefore, not be necessary for an employer to always lead evidence to show that there was a breakdown in the employment relationship, this can only happen where the employer has, of

[13] Case number JA 100/14.

necessity, first proven that the employee was guilty of gross misconduct. In the present case, however, gross misconduct has not been proven, given the complete absence of evidence to that effect, and so there can be nothing to imply a resultant breakdown in the trust relationship which would make it inappropriate or intolerable for the employee to resume his employment at Applicant.

[22] There is thus also no basis to support Applicant's second ground of review.

The helping hand cases

[23] Applicant's ultimate reliance on the so-called "helping hand cases" would appear to betray a realisation that the evidence led by Applicant at the arbitration was wholly inadequate and incapable of discharging the employer's burden of proof[14].

[24] Although there may be situations where an arbitrator's failure to assist one of the parties may end up justifying the reviewing and setting aside of those arbitration proceedings, this needs to be considered in the context of the following statements made by Musi J in *Bafokeng Rasimone Platinum Mine:*[15]

> "In conclusion, it needs to be stated that whereas there is a duty on arbitrators to provide guidance and assistance to lay litigants, the question of whether such duty arose and whether failure to carry it out is an irregularity rendering an award reviewable is a matter to be decided with reference to the particular circumstances of each case. Care should be taken not to straddle the fine line between legitimate intervention by an arbitrator and assistance amounting to advancing one party's case at the expense of the other. Otherwise we would be opening the flood gates allowing every lay representative who has bungled his/her case to seek its re-opening by shifting the blame to the arbitrator. At the end of the day, the cardinal question is whether the merits of the dispute have been adequately dealt with and fairly so in compliance with the provisions of section 138 of the Labour Relations

[14] Which, if that is the case, would mean that there can be no merit to both grounds of review suggesting that the Arbitrator arrived at unreasonable decisions.
[15] *Bafokeng Rasimone Platinum Mine v CCMA & others* [2006] 7 BLLR 647 (LC), para 17.

Act. That question can best be answered by considering the conduct of the arbitration proceedings as a whole…"

[25] In the present matter, if one reads the transcript of the arbitration proceedings from start to finish, there is nothing to suggest that Mr Markus was out of his depth, that he did not understand the process and what was required of him at the arbitration. Mr Markus quoted extensively from the Labour Relations Act, presented lengthy argument on Applicant's behalf which show that he was well aware of the pertinent issues, and he cross examined both Dr Bohnen and First Respondent in a relatively formal, legalistic manner, which suggests that he was apt and somewhat experienced in this regard. Mr Markus does not come across in the transcript as an inexperienced or ignorant layperson who would need to be guided. Third Respondent did, however, indicate to Mr Markus what the employer was required to prove albeit without telling him exactly how to go about doing so. Third Respondent also specifically asked Mr Markus whether he was going to call any witnesses and he responded that he would only be (cross) questioning the other side.[16] Applicant therefore wilfully and consciously elected not to call any witnesses, despite the Arbitrator having specifically asked Mr Markus this question.

[26] Mr Markus appeared in his capacity as the Industrial Relations Superintendent of Applicant, a large mining company. In the *Bafokeng Rasimone* case, Musi J makes the point that a large corporation "is expected to be able to equip its representatives with enough resources to enable them to conduct its arbitrations properly or to ensure that it is represented by people who are sufficiently competent to do so."[17]

[27] Based on all of the above considerations, I am not convinced that there was a duty on Third Respondent to do more than what he did or that the arbitration proceedings should be reviewed and set aside on that basis.

[28] Third Respondent's arbitration award is not one which a reasonable decision-maker could not make. There is no reason in law why that award should be reviewed or

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[16] Page 38 of the CCMA Record, at lines 25 – 28.
[17] Supra at para 10.

set aside. No compelling reason has been shown as to why Applicant should not be required to comply with the CCMA Award dated 31 March 2014 and why it should not retrospectively reinstate First Respondent to its employ with effect from 25 April 2014.

Order

In the premises the following order is made:

1. The review application is dismissed with costs.

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Ferreira, AJ

Acting Judge of the Labour Court

Appearances:

FOR THE APPLICANT: Advocate MJ Van As

INSTRUCTED BY: Cliffe Dekker Hofmeyr

FOR THE FIRST RESPONDENT: Gerhard Visser of Solidarity