IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2243/21

In the matter between:

SOUTH AFRICAN REVENUE SERVICES (SARS) **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) **First Respondent**

COMMISSIONER FAIZEL MOOI N. O **Second Respondent**

NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS UNION (NEHAWU) **Third Respondent**

BENNETH MATHEBULA **Fourth Respondent**

Heard: **20 July 2023**

Delivered: **The judgment was handed down electronically by circulation to the applicant and respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down is deemed to be 12h00 on 21 July 2023.**

Summary: Application to review and set aside an arbitration award. The impugned award falls outside the bands of reasonableness. Held: [1] The application for review is upheld and the arbitration award is set aside. It is replaced with an order that the dismissal of the employee is substantively fair. Held: [2] There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application brought in terms of section 145 (1) of the Labour Relations Act (LRA)[1]. The applicant before me, the South African Revenue Services (SARS) is seeking to review and set aside an arbitration award issued by the learned Commissioner Faizel Mooi (Mooi) on 14 September 2021. Mooi found that the dismissal of the fourth respondent, Mr. Benneth Mathebula (Mathebula) was substantively unfair. Mooi ordered SARS to reinstate Mathebula and to pay him a certain amount for the loss of salary[2]. SARS was aggrieved by the arbitration award and launched the present application. The application is duly opposed by the National Education, Health and Allied Workers Union (NEHAWU) and Mathebula.

Background Facts

[2] The facts pertaining to the present dispute are to a large degree common cause and less complicated. Mathebula was employed as a Junior

---

[1] Act 66 of 1995 as amended.

[2] Although this specific order was not challenged on review, it is doubted by this Court as to whether section 193 (1) of the LRA permits Mooi to issue such a relief. It may well be *ultra vires* the LRA. It is in the nature of a contractual relief, which may require physical reinstatement before it can be claimed. See in this regard *Department of Public Works v GPSBC and others* (JR1483/18) dated 5 March 2021.

Investigator by SARS. On or about 7 September 2020, Mathebula send a text message to his supervisor, Mr. Mantsho (Mantsho), to the effect that he was not feeling well and that he would complete a sick leave application once the network is fine. As a result of this message, Mantsho accepted that Mathebula is not fine and excused him from attending work. The following day, 8 September 2020, as well, Mathebula represented to his supervisor that he was still not feeling well. Worried about these developments, Mantsho advised Mathebula to seek medical intervention, if he had not done so as yet. Mathebula responded by indicating that if he does not get better he will have to see a medical doctor.

[3] On 9 September 2020, Mathebula allegedly consulted one Dr. Hlayiseka Chewane (Chewane). Chewane issued a medical certificate certifying that he examined Mathebula on that day and according to him, Mathebula was unfit from 9-11 September 2020 to resume duties and will be fit to do so on 12 September 2020. Although, it appeared difficult to decipher the nature of illness recorded on the medical certificate, with the second pair of reading glasses and a concerted squinting of eyes, the following is apparent to be the nature of illness that Mathebula presented with:

> "NATURE OF ILLNESS
>
> Absence due to medical condition"[3]

[4] Whilst watching the news on television, Mantsho spotted Mathebula participating in a protest march called by the Economic Freedom Fighters (EFF) against Clicks (Pty) Ltd on the two days that he had called sick. Mantsho gathered visuals from *YouTube* in order to confront Mathebula about the discovery he made.

[3] Not being a *medico*, this Court has never come across such an illness. All the more reasons for Chewane to have deposed to an affidavit to clarify this. This Court aligns itself with the views expressed by the learned Acting Justice Sethene in *Epibiz (Pty) Ltd v CCMA and others* (JR616/18) dated 17 July 2023 at para 37-39.

[5] On or about 14/15 September 2020, Mantsho confronted Mathebula in writing and stated to him that he saw him on the news while he was expecting him to be off due to illness. For the purposes of this judgment, it is important, to quote the response of Mathebula in full. He recorded the following:

> "Hi Pule
>
> Before I respond to your options, which I will; may I ask how did this come to your attention and by who (complainant) so that we are on the same page."

[6] This response was raised despite what the clear message of Mantsho was, which read:

> "Hi Benneth
>
> It came to my attention when I saw you on the 19:00 news, while I was expecting you to be off due to illness."

[7] Ultimately, Mathebula responded as follows:

> "Please note that as I notified you that I was not feeling well on 7 September 2020, later on that day I became bit better after taking some medication. A friend came to check on me and I asked if I could accompany him to Sandton. I did not see anything wrong with that, actually I thought maybe it is good to go out stretch a bit, as I was not bedridden and I felt probably after that I would be fine.
>
> So it is true that you might have seen me, unfortunately the following day I got worse and I did let you know.
>
> If there is any wrongdoing I might have committed, I am willing to take full responsibility for my actions.
>
> The only reason I asked for details was that you did not ask me on the same day and that made me feel uncomfortable.
>
> Thank you."

[8] On 4 November 2020, Mathebula was served with a disciplinary notice in order to answer to the following allegations:

> "Dishonesty
>
> In that on or about their 7 September 2020 you were dishonest to your manager Pule Mantso, and again you deliberately and intentionally misled him to believe that you were off sick when you called him at about 17h00 indicating that you were not feeling well on the day and that you bought medication from the pharmacy and fell fast asleep while the true reflection was that you attended and or participated on the EFF protest in Sandton.
>
> Dishonesty
>
> In that on or about 8 September 2020 you were dishonest to your manager Pule Mantso, and again you deliberately and intentionally misled him to believe that you were sick when you send him a message at about 6h40 indicating that you are still not feeling well and that if you continue to be ill you will consult a doctor while the true reflection was that you attended and or participated on the EFF protest again for the second day in Sandton.
>
> Gross dishonesty
>
> In that on or about the 7th to the 8th September 2020 you were dishonest to your manager Pule Mantso, and again you deliberately and intentionally misled him to believe that you were sick while you know that on the 7th and 8th September 2020 you will be attending and or participating on the EFF protest in Sandton.
>
> And by so doing you broke the trust relationship between you and SARS, misused the time your employer offers to recover from the illness in a dishonest manner and thereby violated the contractual obligations of serving the employer with trust and being honest at all times."

[9] Mathebula was found guilty as charged and dismissed on 24 March 2021. Aggrieved thereby Mathebula, referred and unfair dismissal dispute to the CCMA. As indicated above, Mooi found that his dismissal

is substantively unfair. SARS was aggrieved thereby and launched the present application.

Grounds of review

[10] SARS contends that Mooi failed to consider the evidence before him and came to a conclusion which no reasonable decision maker could have made in reinstating Mathebula. SARS provided various bases, upon which this court must conclude that the arbitration award falls outside the bands of reasonableness. It is unnecessary for the purposes of this judgment to enumerate those various bases. It suffices to mention that this Court, as it shall be demonstrated below, agrees with most of those bases.

Evaluation

[11] It is common cause that Mathebula participated in a protest action on a day in which he unashamedly and audaciously indicated to SARS that he was not feeling well. It is apparent that although he was not feeling well to attend to his contractual duties, he felt well to participate in a protest action. This Court must declare upfront that, in its fervently held view, Mooi failed to ask and deal with the relevant question. The question is whether Mathebula was so indisposed that he could not attend to his work? An answer to this pertinent question reveals the misleading that Mathebula presented to SARS. In light of the uncontested evidence of participation in the protest action, it axiomatically follows that he was not so indisposed that he could not attend to his work.

[12] That being the case, it must be so that when he represented to his supervisor that he was not feeling well so that he must be excused from work, he was not being truthful about the state of his health. Clearly, when Mathebula represented his state of health to his supervisor, he was seeking to be excused from performing his contractual duties. Mathebula was excused from performing his contractual duties purely because he was allegedly not feeling well. Had he indicated to his supervisor that he seeks to be excused from work in order to participate in a protest action,

his supervisor would not have excused him. Knowing full well that if he provides the true reason for being excused he will not be indulged, in all probabilities he had to fake illness in order to achieve a putative authorized or justified absence.

[13] As an indication that Mathebula was not having medical challenges, he only sought medical attention two days after the date of 7 and 8 September 2020. To his obvious disadvantage, Chewane certified that he was only unfit to resume duties two days after the protest action. Although the medical certificate submitted for the 9-11 of September 2020 was not supported by an affidavit from the treating doctor, as to be expected, it is perspicuous that there was no empirical and objective evidence to support the allegation that on the days of the protest action Mathebula was indeed not feeling well. A reasonable decision maker, applying the accepted and trite standard of proof on the preponderance of probabilities, would have come to the conclusion that the employee absented himself on the days in question in order to attend to the protest action and not that he was ill.

[14] It seems to be so that the employee took advantage of the provisions in the policy of SARS to the effect that for illness lasting two days or less, the employer will accept the representations of the employee as to their fitness to attend duty without the need for a medical certificate. As correctly submitted by Mr. Naidoo, appearing on behalf of SARS, the above provisions were inserted in the policy simply because SARS had trust in its employees. The provisions do not mean that a false representation should be acceptable to SARS simply on the say-so of an employee. A submission to that effect ought to be rejected outrightly. Mooi impermissibly speculated that it was probable that the illness alleged by Mathebula commenced in the earliest on 7 September 2020. This conclusion is speculative because Chewane who saw Mathebula on 9 September 2020, does not remotely suggest that the medical condition that he diagnosed on the day presented itself earlier than the examination date. A reasonable decision maker does not predicate his or her decision on speculation. Having speculated, it must follow that the

decision reached is not one that a reasonable decision-maker would reach. To my mind, this speculative conduct actually amounts to gross irregularity. SARS was not warned that Mooi would rely on such speculative evidence. Such deprived SARS of a fair trial of issues.

[15] A similar situation presented itself before the Labour Appeal Court in the matter of *Woolworths v CCMA and others (Woolworths)*[4]. Although the judgment was handed down in 2021, the principles outlined in the judgment finds application in the present situation. This Court agrees with Mr. Naidoo that the *Woolworths* judgment is on all fours with the present matter. The distinguishing that Mametja attempted is not apparent, particular on the principle advanced by the case.

[16] Amongst others the LAC, had the following to say, which aptly apply with sufficient vigor in the present matter:

> "the employee acted dishonestly in absenting himself from work on the basis that he was too ill to perform his duties but then traveled for at least an hour to support his local rugby team, knowing full well that he would be paid for the day."

[17] The above situation is not dissimilar with the current situation. Despite calling ill, Mathebula attended a protest action where he sang and clapped hands in support of the action. Surely, a person who is not feeling well cannot be expected to act in that manner.

[18] The LAC went further and stated the following:

> "This lenient approach to dishonesty cannot be countenanced. The third respondent held a relatively senior position within the organization of the applicant at Humansdorp. He was palpably dishonest, even on his own version. He expected to get away with the enjoyment of attendance at a rugby match on the basis of claiming sick leave and then enjoying the benefits thereof. This is dishonest conduct of a kind which clearly negatively impairs upon a relationship of trust between an employer and

[4] (2022) 43 ILJ 839 (LAC).

> employee. It is clear that the relationship of trust as a result of his initial unreliability and now dishonest conduct had broken down…"

[19] Similarly, in *casu*, Mathebula expected to get away with the enjoyment of supporting the protest march while claiming to be sick. The probabilities were overwhelming that Mathebula was not sick and in fact he was malingering in order to avail himself for the protest action. If he was able to clap hands and sing, it must follow that he would have been able to perform his contractual duties. His first reaction to his manager when he was first confronted is not one of an honest employee. Why would he want to know who the complainant was and so on? If he was honest he would have been upfront when his supervisor confronted him. His later attempt to explain his first reaction is feeble and actually further proves his lack of candour. Mametja submitted that SARS failed to prove that Mathebula had the necessary intention to deceive as such he was not guilty of dishonesty. Mooi equally concluded that there was insufficient evidence to demonstrate an intention to mislead SARS. The question is how does an employer prove an intention in these type of cases? Intention goes to the state of mind. However, it can be inferred when regard is had to all the surrounding circumstances. Like in all cases of malingering, it is an employee who alleges illness. He who alleges must prove. Ordinarily, illness, it being a medical condition, it can only be empirically and objectively confirmed by medical experts. The fact that an unsubstantiated medical certificate was produced and accepted for the 9-11 of September 2020, does not objectively prove that Mathebula was ill on 7-8 September 2020. It is for that reason that Mooi impermissibly resorted to conjecture.

[20] Regard being had to the fact that Mathebula participated in a protest action whilst allegedly he was ill, the only inference to be drawn with regard to his state of mind is that when he asserted and faked illness he must have intended to mislead SARS to excuse him from work in order for him to attend the protest action. Mametja submitted that the policy of SARS does not suggest that a person who is indisposed cannot run errands like going to the nearby grocery store to buy bread. It is

unnecessary for the policy to regulate such minutiae. Because, an employment relationship is predicated on trust, SARS expects its employees to be truthful and honest. In this particular case, Mathebula created a false impression that he was too ill to come to work. The fact that he was seen at the protest march is sufficient enough evidence to expose his false impression.

[21] It must be so that had the manager not seen Mathebula on television, to this day, SARS would have accepted that its employee was too indisposed not to attend to his contractual duties. Surely, given Mathebula's initial reaction when confronted, he would not have volunteered to SARS that in the two days that he was allegedly ill he was fit to clap hands and sing, for whatever period of time, at a place that is 10 minutes away from his place of residence.

Conclusions

[22] For all the above reasons, the arbitration award of Mooi does not pass the constitutional muster. Accordingly, the arbitration award falls to be reviewed and set aside and be replaced with a decision that complies with the constitutional standard.

Order

[23] In the results, I make the following order:

1. The arbitration award issued by Commissioner Faizel Mooi under case number GAJB4164-21 dated 14 September 2021, is hereby reviewed and set aside.
2. It is replaced with an order that the dismissal of Mr. Benneth Mathebula was substantively fair.
3. There is no costs order.

_____

GN Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr. S Naidoo of CDH Inc Sandton.

For the Respondent: Mr. M Mametja of MPM Attorneys, Johannesburg.