

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 5727/2009

In the matter between:

THE MINISTER OF SAFETY AND SECURITY

Applicant

and

THE DISPUTE RESOLUTION PANEL

First Respondent

S M O SEOBE N.O.

Second Respondent

M M RAMPOU

Third Respondent

CORAM:

KRUGER, J *et* LEKALE, J

HEARD ON:

11 MARCH 2013

JUDGMENT BY:

LEKALE, J

DELIVERED ON:

22 MARCH 2013

INTRODUCTION AND BACKGROUND

- [1] On 27 February 2009 the third respondent, a police trainee with the applicant, was subjected to a disciplinary hearing on allegations of fraud and was, thereupon, found guilty of misconduct and issued with a final written warning as a sanction.

- [2] The divisional commissioner responsible for training with the applicant, thereafter, overturned the said sanction and notified the third respondent that her agreement (the contract) had been terminated with effect from 12 March 2009 because she was found guilty of serious misconduct.
- [3] The third respondent felt aggrieved by this turn of events and referred a dispute concerning the termination of her appointment contract to the first respondent in terms of the contract.
- [4] On 29 June 2009 the third respondent was found guilty of fraud by the criminal court at Welkom on the same facts.
- [5] The second respondent was, eventually, appointed by the first respondent as the arbitrator to resolve the dispute in terms of the provisions of the Arbitration Act 42 of 1965 (the AA).
- [6] The arbitration was conducted on 27 July 2009 and on 9 September 2009 the arbitrator issued an award, *inter alia*, declaring the termination of the contract unfair and directing the applicant to reinstate the third respondent as a trainee without any loss of benefits and on terms and conditions no less favourable to her than those that prevailed as at the date of termination of her contract.
- [7] The applicant feels hard done by the award and now

approaches us in terms of Rule 53 of the Uniform Rules of Court for an order, *inter alia*, reviewing and setting aside the said award in terms of section 33 of the AA.

[8] At the commencement of the proceedings the third respondent effectively consented to condonation of the late filing of the application and condonation was granted accordingly to the extent that it was necessary.

[9] There was, further, no indication on the papers that service was, in fact, effected on the arbitrator. The third respondent, however, desired finality in the matter and consented to the matter proceeding notwithstanding that fact. There is, as such, no appearance for the first and second respondents.

ISSUES BEFORE AND POWERS OF THE ARBITRATOR

[10] It is clear from the arbitration agreement entered into by and between the parties that the arbitrator was enjoined to determine whether or not there was fair cause to make a finding of misconduct against the third respondent as the trainee and, if so, whether or not the sanction imposed was fair.

[11] The arbitrator was empowered by the arbitration agreement to make an award which he deemed reasonable and appropriate in the circumstances.

ARBITRATION AWARD

[12] The arbitrator found that the fact that the third respondent inserted the initials and surnames of her two relatives in the application forms in spaces where the said relatives were supposed to sign did not make her guilty of fraud because she would not have been guilty of fraud if she had “signed and inscribed ‘pp’”.

[13] The arbitrator, further, concluded that the prescripts of fairness require that the dismissal be declared unfair and the sanction was, thus, also unfair.

APPLICANT’S CONTENTIONS

[14] At the commencement of her verbal submissions on behalf of the applicant, Ms Snyman, correctly abandoned all contentions to the effect that the arbitrator exceeded his powers by considering and determining whether or not there existed a fair reason for finding the third respondent guilty of misconduct.

[15] The applicant’s attack against the award is, therefore, limited to some four grounds it first being contended that it was common cause before the arbitrator that the third respondent was found guilty of misconduct and convicted by the criminal court on the charge of fraud in that she signed application forms, for admission to the training programme with the applicant, for two relatives fraudulently. That the arbitrator, therefore, committed gross misconduct in ignoring the verdict of a criminal court by finding that the third respondent was, on the facts, not guilty of

fraud.

[16] It is, further, the applicant's case that the arbitrator exceeded his powers in reinstating the third respondent.

[17] It is, furthermore, contended for the applicant that the arbitrator misdirected himself and committed misconduct in failing to appreciate that the applicant, through the divisional commissioner responsible for training, was entitled and obliged to terminate the third respondent's contract in the circumstances and in terms of clause 7.1 of the contract between the parties.

[18] The arbitrator, further, exceeded his powers, according to the applicant, when he found that the applicant was guilty of following an unfair procedure by excluding union representatives from disciplinary hearings.

[19] It is the applicant's view that the arbitrator erred and committed gross misconduct in relation to his duties in regarding the third respondent as an employee and, thus, applying the provisions of the Labour Relations Act 66 of 1995 (LRA) when the actual relationship between the parties was purely contractual as opposed to an employment relationship.

THIRD RESPONDENT'S CONTENTIONS

[20] Mr Basson, for the third respondent, supports the award and

maintains that trainees in the position of his client are employees as evidenced by the provisions of clause 1 of the contract read with regulation 35(1)(b) of the South African Police Service Employment Regulations of 1999. Section 37 of the South African Police Service Act 68 of 1995 also regards trainees as members appointed in the South African Police Service.

- [21] The arbitration was conducted in terms of the AA and the test of rationality, justifiability or reasonableness applicable to arbitrations conducted in terms of the LRA are, therefore, not applicable in Mr Basson's view. The only grounds for review in terms of the AA are gross misconduct, gross irregularity and excess of powers.
- [22] The onus was on the applicant, at the arbitration hearing, to prove that there existed a fair reason to terminate the contract and, as such, evidence of fraud had to be produced. No such evidence was before the arbitrator according to the third respondent.
- [23] The arbitrator had the authority to award the third respondent reinstatement in terms of the contract.
- [24] The applicant had no power to change the sanction of final written warning because the procedure agreed upon between the parties only makes provision for an appeal by a trainee and

not by the applicant.

- [25] The applicant should have afforded the third respondent a hearing before it took any independent decision to terminate the contract. It was not entitled to rely on the findings of the disciplinary procedure which had its own conclusion in the form of a final written warning. The presiding chairperson of such an enquiry had the power to, *inter alia*, terminate the contract but decided, in the circumstances of the third respondent, that a final written warning was the most appropriate sanction among a range of possible sanctions available to him.

APPLICABLE TEST AND LAW

- [26] As correctly submitted by Mr Basson, the only grounds of review available to parties to a private arbitration conducted in terms of the AA are those set out in section 33 of the AA. As the Supreme Court of Appeal found in **Telcordia Technologies Inc v Telkom SA Ltd** 2007 (3) SA 266 (SCA) at par [50]:

“[50] By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.

[51] Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in section 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise..."

[27] The reasonableness standard of review applicable to administrative actions and compulsory or statutory labour arbitrations in terms of section 145 of the LRA is, as such, not applicable to private arbitrations as correctly pointed out for the third respondent. This test, as extended to such labour arbitrations by the Constitutional Court in **Sidumo and Another v Rustenburg Platinum Mines Ltd and Others** 2008 (2) SA 24 (CC) is, thus, limited to review of compulsory arbitrations in terms of LRA where the question is whether or not the decision reached by, *inter alia*, a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) was one that a reasonable decision-maker could not reach. (See further **UASA v Impala Platinum Ltd and Others** [2010] 31 ILJ 1702 (LC).)

REVIEW

[28] The parties are in agreement that the arbitration took place in terms of the AA and that the award is final and binding.

[29] The applicant feels aggrieved by the outcome of the arbitration proceedings and seeks to have the award set aside on, *inter alia*, the ground that the arbitrator treated the third respondent

as an employee and, as such, accorded her more rights than she actually had. In my view the status of the third respondent as at the date of termination of the contract is of no consequence in the instant matter. Such status does not determine the applicable review standard because the arbitration procedure agreed upon by the parties is one in terms of the AA. The fact that there existed an employment relationship between the parties at the relevant time would have entitled the third respondent to refer the dispute to compulsory arbitration in terms of the LRA but for the arbitration agreement between the parties. It is, thus, not necessary, in my judgment, to determine the relationship between the parties as at the date of termination of the contract.

[30] The applicant, further, assails the award on the ground that the arbitrator strayed beyond his jurisdiction when he directed the applicant to reinstate the third respondent. We are, however, satisfied, as correctly submitted by Mr Basson, that the arbitrator was well within the boundaries of his powers in this regard because he was empowered by the arbitration agreement to make an award which he deemed reasonable and appropriate in the circumstances.

[31] We are, furthermore, not persuaded that a finding by the arbitrator that the third respondent was not guilty of fraud amounts to reviewable misconduct or an irregularity in terms of section 33 of the AA. Only a court exercising review powers in

terms of, *inter alia*, section 145 of the LRA could possibly have come to the conclusion contended for by the applicant. We may not share the arbitrator's view in this regard but our task, in the present matter, is generally to consider the method employed by the arbitrator to arrive at his award and not to question the reasonableness and/or appropriateness and/or correctness of the award. (See **Telcordia Technologies Inc v Telkom SA Ltd**, *supra*, at 298C.)

- [32] We are, further, not convinced that in questioning the correctness of the verdict of the criminal court or in ignoring it the arbitrator committed a gross irregularity. In this regard, the question is whether or not the act or omission complained of prevented a fair arbitration. In our view the arbitrator did consider the verdict of the criminal court and consciously rejected or ignored it, or downplayed its importance after applying his mind to it. As Mr Basson correctly points out, the arbitrator was not bound by the opinion of the criminal court in the circumstances of the instant matter because the termination of the contract was not based on the verdict in question but was, in fact, based on the outcome of the disciplinary enquiry. (See generally **Goldfields Investment Ltd v City Council of Johannesburg** 1938 TPD 551 at 560 – 561.)

- [33] Lastly we are not satisfied that the arbitrator, in fact, made a finding that the disciplinary hearing was procedurally unfair in that union representatives were excluded from such

proceedings. A proper reading of the award indicates that the relevant submission was made for or by the third respondent at the arbitration process and was not a finding by the arbitrator. (See p 34 of the indexed review papers under the heading “**The Applicant’s Submissions**” and p 7 of the indexed bundle of the review record which contains the third respondent’s Heads of Argument at the arbitration hearing.) It is not apparent *ex facie* the impugned award that the arbitrator made any findings on the issue. In the award findings (paras 1 – 7 at the end of the award) nothing is said about the conviction of fraud.

- [34] The award is not reviewable on any of the grounds recognised by section 33 of the AA. The principal reason why this application should be dismissed is that the divisional commissioner amended the sanction imposed by the presiding officer at the disciplinary enquiry to the more serious sanction of dismissal without affording the third respondent a hearing. The action of the divisional commissioner to dismiss the third respondent was unreasonable and procedurally unfair and that sanction was correctly set aside by the second respondent, the arbitrator.

ORDER

- [35] The application is dismissed with costs.

L. J. LEKALE, J

I concur.

A. KRUGER, J

On behalf of applicant:

Adv F.M.M. Snyman
Instructed by:
c/o State Attorney
BLOEMFONTEIN

On behalf of third respondent:

Adv J.L. Basson
Instructed by:
Grosskopf Attorneys
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