



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 49/2019

In the matter between:

BETTY MOTHIBA

Appellant:

and

EXXARO COAL (PTY) LTD t/a

GROOTGELUK COAL MINE

Respondent

Heard: 27 May 2021

Delivered: 14 June 2021

Coram: Davis JA, Coppin JA and Savage AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This is an appeal against a judgment of LaGrange J, sitting in the court *a quo* of 25 February 2019, in terms of which the learned judge set aside an arbitration award of a Commissioner sitting as an arbitrator on behalf of the Commission for Conciliation Mediation and Arbitration (CCMA) in which the

award that was made was that the dismissal of the appellant was substantively unfair.

- [2] Regrettably, as noted previously by this Court, the chronology of the events leading up to this appeal reveals the failure of the adjudicative system as provided for in the Labour Relations Act 66 of 1995 (LRA) to fulfil the legislative mandate of ensuring the expeditious resolution of labour disputes.
- [3] The appellant had been employed by the respondent as a laboratory assistant as of 17 March 2008. She was dismissed in 2015. The Commissioner's award was delivered on 26 October 2015 and the consequent application for review was launched on 4 December 2018. Judgment in the court *a quo* was delivered on 26 February 2019. More than two years later, this Court is now required to deal with the appeal.

The background

- [4] During the course of December 2012, the appellant applied to the respondent's housing department for subsidised accommodation offered by the appellant. In the relevant application, the appellant was required to sign an affidavit confirming that 'I do not own any property within 50 kilometre radius from the main gate of "Exxaro Grootgeluk Coal". This affidavit was signed by the appellant on 19 December 2012. Her application for housing proved to be successful.
- [5] In January 2015, the respondent received information suggesting that a number of employees, including the appellant, had benefitted from the housing programme in circumstances in which they ought not to have been successful applicants for the subsidised housing. Upon an investigation by the respondent, it was found that the appellant, at the time when she applied for the housing benefit and signed the relevant affidavit, owned a property within a 50 kilometre radius from the Grootgeluk main gate.
- [6] Pursuant to this finding, the appellant was charged as follows:

'Charge 1: Dishonesty: in that it is alleged that she made a misrepresentation to Exxaro by deposing to an affidavit on the 19th of December 2012 in which she confirms that she does not own property within a 50 km radius from the Grootgeluk Mine whereas she was in fact the owner of a residential property within the 50 km radius from 15th October 2010.

Charge 2: Non-disclosure/misrepresentation of relevant information that employee failed to disclose direct or indirect interest and benefits received in that it is alleged that she failed to disclose relevant information to Exxaro regarding the purchasing of her property and letting out and receiving of rent for the same...'

- [7] She was found guilty as charged and dismissed. In response, the appellant referred a dispute to the CCMA. The arbitrator interpreted the phrase 'I do not own any property within a 50 kilometre radius...' as being somewhat ambiguous in that 'the wording still lacks clarity as to whether it was referring to an empty stand or a stand that has ben improved into a dwelling house.' As a result, the arbitrator concluded: 'the employer has failed to discharge the requisite onus of proving that the employee intentionally made a false declaration in the affidavit when she responded by stating that she did not own property within the radius of 50 km.'

The court a quo

- [8] The review application brought by the respondent was heard by LaGrange J who found that the wording in the affidavit was not ambiguous when it referred to 'ownership of any property. The court a quo noted that the appellant was not illiterate, she had been employed as a laboratory assistant and therefore could be taken to understand the meaning of the words 'ownership of any property'. Thus 'it is difficult to see how an arbitrator could reasonably conclude that she had deposed to such a document without giving a thought to its contents and was blissfully unaware of what it contained or that she could have been unaware of the fact that by deposing to the affidavit contained in the declaration that was making a representation that she had no interest in any property.' For this reason, the

learned judge set aside the arbitration award and held that the appellant's dismissal had been substantively fair.

The appeal

[9] Before this Court, the appellant's counsel submitted that the purpose of requiring the appellant to sign an affidavit related to the respondent's policy that the subsidy should not apply to those employees who own properties which were ready for habitation as opposed to an employee who might own an open piece of land. On the basis of this conception of the purpose of the policy, the word 'property' had to be given the narrow meaning which was accorded to it by the arbitrator.

[10] There is no merit in this argument. The appellant provided no evidence to the effect that she had not reasonably understood the contents of the affidavit which she was required to sign, that the wording referred exclusively to developed land nor was there any other evidence presented to the effect that she did not understand that which she was required to sign. In formulating the reasons for the arbitration award, the Commissioner, upon his own volition, had sought to substitute his own opinion as to the meaning of the clear meaning of the words 'ownership of property' as employed in the affidavit as opposed to that which manifestly was the only reasonable construction of the words so employed. The appellant knew well that the affidavit which she signed was in connection with a lease, the benefits of which would not have been available to her, had she had the respondent known about her ownership of land. There is no warrant for the construction that what she signed was a disclosure that she did not own improved land with a dwelling on it as opposed to ownership of vacant land.

[11] In summary, the court *a quo* came to the only plausible conclusion when it stated 'the probabilities ineluctably point to her being aware of what she was deposing to and the defences advanced by representatives and adopted by

the arbitrator were not available to her as they were not supported by her own evidence.’

[12] For these reasons, the appeal must fail. Given the fact that the appellant has been out of employment for some considerable period of time, the only leniency that should be accorded to her is that this Court should not make an adverse costs order.

[13] The appeal is dismissed.

Davis JA

Coppin JA and Savage AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Adv K Ramarumo

Instructed by Mohale Inc. Attorneys

FOR THE RESPONDENT:

Adv C E Watt-Pringle SC

Instructed by Shepstone & Wylie Attorneys