

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

Case no: D757/06

In the matter between:

MHLATUZE WATER BOARD

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

1st Respondent

DORASAMY N.O

2nd Respondent

JAMES BARNARD

3rd Respondent

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the applicant seeks an order to review and set aside the arbitration award issued by the second respondent under case number KNRB883-06 and dated 7 November 2006.

Background facts

- [2] The facts in this matter are fairly common cause. The third respondent, hereafter referred to as "the employee" was charged and dismissed for dishonesty. The employee who also served as trustee and chairman of the Mhlathuze Water (1998) Pension Scheme (the Fund) was charged with conduct relating to dishonesty in that that he signed the withdrawal form of Mr Graham (Graham) indicating that he (Graham) had retired when he was in fact dismissed.
- [3] It is common cause that Graham who had been dismissed and had referred his allege unfair dismissal dispute to the CCMA, addressed a letter to the employee as the chairperson of the Fund and indicated that he was entitled to withdraw the value of his benefit from the Fund and to invest it in a separate annuity. He further indicated that if the Board was not prepared to allow him to keep the money in the Fund he requested that a declaration form regarding retirement which had been issued to him by Simeka Consultants, the official consultants of the Fund be completed and be signed. The letter reads as follows:

"Withdrawal from Mhlathuze Water Pension Fund

With the termination of my services as an employee at

end November 2005, my membership of the Mhlathuze Water Pension Fund was also, in terms of the rules of the fund, terminated with effect from this date.

As a consequence of this, I must now withdraw the value of my benefit in the fund and re-invest the money in a separate annuity. I wish to take the tax free portion permitted in terms of the Income Tax Act. The Board may, however, decide to allow me to continue keeping the money in the fund in which case I will be entitled to all the benefits offered by the fund, namely, group life and disability cover.

Should this not be the case, then I would be most grateful if you could sign the Declaration Regarding Retirement form sent to you recently by Simeka Consultants, and forward this to Sanlam. Whilst my services were terminated and I did not actually retire from service, I would appreciate you signing this form so as to minimize the tax implications. The Pension Fund rules allow employees to retire after age 55, an age which the Receiver of Revenue also recognizes for retirement.

*I acknowledge that signature of this form applies
only to the Mhlathuze Water Pension Fund and that
no other benefits which I enjoyed as an employee
of the Board, will be affected thereby,
Yours Faithfully,
X.Graham.”*

[4] The employee testified that he was contacted by Graham during the middle of February 2006, and informed him that his dismissal was pending before the CCMA and that he had no income. The employee then referred Graham to Simeka Consultants and the applicant's human resource department.

[5] During April 2006, Graham reverted back to the employee and informed him that he had been advised by Simeka Consultants that they would release his funds once the declaration regarding retirement was signed. This form was completed on the 11 April 2006, and the employee signed the form in his capacity as chairperson of the Fund. The employee further testified that he was also advised by Simeka that Graham was close to "retirement, being 63 years of age, he was entitled to take a

maximum of one-third of his funds in cash. The employee also believed that the amount of R120 000, 00 which Graham wanted to withdraw from his scheme was in conformity with the Pensions Fund Act 24 of 1956 and the Income Tax 103 of 1976.

[6] It was as result of the above and in particular the advice he received from Simeka that the employee, claim to have held the view that Graham's retirement from the scheme was above board and that the applicant would not suffer any harm as a result. He believed that Graham was preserving the bulk of his funds for retirement and after signing the form he submitted it to Simeka. It was for this reason that the applicant charged the employee with the following:

"(a) Serious dishonesty in that on 11 April 2006 the employee knowingly and fraudulently misrepresented the reason of Mr Theo Graham's withdrawal from the employment of the employer by signing a declaration of retirement;

(b) Abuse of trust, authority and position in that by signing a declaration as the finance manager and chairperson of the pension fund, the employee used his position to contradict the employer's position in respect of Mr Graham's termination".

[7] At the disciplinary hearing the employee was found guilty of serious dishonesty in that on 11 April 2006 he fraudulently misrepresented the reasons for Graham's exit from Fund as being retirement instead of dismissal. He was also found guilty in that he abused his position of trust and authority in that he used his position as the finance manager and chairperson of the Fund to require Ms Berning to fill the declaration form incorrectly and thereafter submitting the same to Simeka.

The award

[8] The parties at the arbitration hearing agreed that issues to be determined by the commissioner were the following:

- "1 Whether the signing of the Declaration Form as a retirement and not dismissal constituted an act of misrepresentation. If it was/was not an act of misrepresentation, what would be the tax implications.*
- 2 Whether the applicant abused or misused his position of trust and authority in making the recording on the declaration Form.*
- 3 Whether the applicant is guilty / not guilty of acting in*

the best interest of the company.

4 *Whether the sanction of dismissal of the applicant was appropriate or not".*

[9] It is apparent from the reading of the award that the commissioner accepted the version of the employee that he was contacted by Graham on his return from sick leave regarding the money he wanted to have from his pension fund. He further found that the amount of R120 000.00 in the form was filled in by the Graham who also indicated that the remainder would be invested in the retirement annuity. The version of the applicant was rejected on the basis that the charge did not “*speak of potential losses suffered as a result of the fraudulent behaviour of the applicant.*”

[10] It was for this reason that the commissioner found that there was no “*no misconduct at least to the degree, which warranted dismissal.*” The applicant was directed to reinstate the employee whose dismissal was found to be unfair.

Grounds for review

[11] The applicant contended that the commissioner failed to apply

his mind, misconducted himself, committed a gross irregularity, and exceeded his powers by acting unreasonably in:

“9.1.1 Finding that Barnard had not acted dishonestly in circumstances where he had endorsed the withdrawal form on the basis that Graham had retired in circumstances where Graham had been dismissed. This is factually incorrect;

9.1.2 The Arbitrator failed to take into consideration that this misrepresentation is profound in that Graham, as a consequence, would receive benefits he would not have been entitled to if he had been dismissed.

9.1.3 An employee who acts dishonestly in a fiduciary capacity, albeit indirectly related to the duties provided to the Applicant, clearly impacts on the trust relationship, especially in circumstances where Barnard was the Accounting Officer within the

9.1.4 The Arbitrator makes findings regarding the fact that the matter before him was a case of fraud when this was not so because the misrepresentation was not against the Applicant but against the Pension Fund. Notwithstanding this, the nature of the misrepresentation would have been

fraudulent with respect to the Provident Fund;

9.1.5 *The Arbitrator has overlooked the fact that Barnard was obliged to act in concert with the trustees and failed to do so as he effectively proceeded on a dishonest frolic of his own;*

9.1.6 *It is noted that the Arbitrator makes reference to the fact that Barnard was influenced by Graham's age which is an irrelevant factor to take into consideration.*

9.1.7 *Finally, the Arbitrator seems to infer that Barnard could be excused from the advice he received from Simeka. Barnard wished to act dishonestly and relied on the advice of a third party which would also have been dishonesty and cannot be an excuse.*

[12] Vahad Sc for the applicant argued that the case before the commissioner was not about the employee defrauding the applicant but concerned the duty of care which the employee owed the applicant in the manner in which he dealt with the issue of signing the form for Graham. The commissioner was also criticised for relying on the version of an unqualified expert witness, Mr Strydom. In this regard the commissioner was

accused of failing to apply the rules of the Fund and understand how the law of taxation should apply.

Evaluation of the award

[13] In considering whether or not to review and set aside the decisions of the CCMA commissioners this Court is enjoined to apply the reasonable decision-marker test which was formulated by the Constitutional Court in **Z Sidumo v Rustenburg Platinum Mines 2007 (28) ILJ 2405 (CC)** and subsequently endorsed by the Labour Appeal Court in **Fedility Cash Management v CCMA and others DA10/05**.

[14] In following its earlier decision of **Bato Spar Fishing (PTY) v Minister of Environmental Affairs and Tourism 2004 (7) BCLR 687 (CC)**, where it was held that the provisions of section 145 of the Labour Relations Act 66 of 1995, were suffused by the criterion of reasonableness, the **Constitutional Court per Navsa AJ in Sedumo (at para 110)** formulated the review test as follows:

“The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is

the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”

[15] In assessing the reasonableness of an arbitration award, the Court should do so in the context where there is recognition that the primary function of determining whether or not the dismissal is fair rests with the commissioner and not itself. In this regard the Court should guard against substituting the decision of the commissioner simply on the basis that it would have dealt with the matter differently. See **Fidelity Cash Management (supra)**.

[16] In my view the decision of the commissioner in the present instance cannot be said to be one which a reasonable- decision-maker could not reach because the decision was arrived at after analysing the evidence which was presented and taking into account the circumstance of the case. The circumstances which the commissioner took into account is that after receiving the

request from Graham, the employee took the necessary step of seeking advice from Simeka as to how he should deal with the request. There is no evidence that despite knowing that the advice was wrong he proceeded to implement it regardless.

[17] I am also unable to agree that the commissioner in arriving at the conclusion that the dismissal was unfair was influenced or placed reliance on the evidence of the so-called expert witness-Strydom, in relation to the interpretation of the rules of the Fund. The commissioner does record in his award what Strydom, said about the rules of the Funds but the analysis of the award does not reveal the commissioner having relied on his testimony in arriving at his decision.

[18] The employee as indicated earlier was charged with fraud and the commissioner after considering all the evidence before him and the circumstance of the case came to the conclusion that the employee did not commit fraud. The commissioner gives his reasons which, in my view, are not unreasonable.

[19] Whilst it is correct that the employee knew that Graham's

employ with the applicant was terminated due to dismissal, it is equally true that he sought the advice of the applicant's consultants as to how he should approach the query which was raised by the Graham. The argument of the applicant that issue before the commissioner was about the duty of care which the employee owed to it would have probably been sustainable had the employee been charged with negligence. The employee would have probably been guilty of an offence had he been charged with gross negligence for the issue would have been why did he not satisfy himself as to the correctness of the advice received from Simeka by reading the rules of the Fund.

[20] In my view there is no basis upon which the decision of the commissioner should be interfered with. It is also my view that the dictates of both law and fairness requires that costs should follow the results.

[21] For the foregoing reasons the review application was dismissed with costs.

MOLAHLEHI J

DATE OF HEARING: 05 JUNE 2008

DATE OF ORDER: 06 JUNE 2008

DATE OF JUDGMENT: 23 JUNE 2003

APPEARANCES

F or the Applicant: Adv Vahad SC

Instructed by: Deneys Reitz INC

F or the Respondent: Adv Hutchinson

Instructed by: Fluxman Attorney