

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

NOT REPORTABLE

CASE NO: JR1526/08

In the matter between:

CHELFRANCHE CLARISSA RICKERT

APPLICANT

AND

DEPARTMENT OF CORRECTIONAL

SERVICES

1ST RESPONDENT

MR. PRAKASH ROOPA N.O.

2ND RESPONDENT

GENERAL PUBLIC SERVICE

CO-ORDINATING BARGAINING

COUNCIL (GPSCBC)

3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number PSGA170-06/07 dated 20th March 2008. In terms of the arbitration award the commissioner found the dismissal of the applicant to have been substantively fair.

- [2] The review application was initially set down on the unopposed roll. However, when the matter was called in Court, it transpired that the first respondent wanted to oppose the matter. In this regard counsel for first respondent submitted that the reason why the first respondent had not filed opposing papers was because the review application was never served to the first respondent and that accordingly the first respondent will apply for a postponement of the matter in order to allow it to file opposing papers.
- [3] This Court took issue with the fact that the applicant in her papers did not cite the first respondent correctly in its capacity as the political head responsible for the administration of the department of correctional services and the fact that it was not clear from the citation itself whether this matter involved the department of correctional services nationally or provincially. This Court also had difficulty with the fact that the bargaining council was not properly cited on the face of the papers but was only referred to elsewhere in the application.
- [4] The applicant opposed the application for postponement and produced a registered mail slip indicating that she served the review application to the first respondent through a registered mail. In as far as the irregularities pointed out above were concerned, the applicant pleaded with this Court to condone such irregularities and attributed such to the fact that she is a lay person and she could not afford to pay for the services of a lawyer. She submitted that all that she wanted was to have her matter determined by the Court on its merits.

- [5] The first respondent submitted an affidavit to this Court deposed by Mr Thinanelwi Godfrey Rammbasa (Rammbasa), a deputy director of the Department of Correctional Services and Regional Coordinator: Legal Services for Limpopo, Mpumalanga and North West Province, wherein Rammbasa explained the reasons why the first respondent did not oppose this review application.
- [6] Rammbasa submitted that he became aware of the review application launched by the applicant on or about 23rd June 2009 when he received a copy of the record of the proceedings from Rooigrond Area Commissioner, North West Province. He continued to state that on the 26th June 2009, he visited the office of the Registrar of this Court for the purposes of uplifting the Court file so that he could verify whether or not the notice of motion was served on the office of the Area Commissioner or the State Attorney but could not find the file on that particular day.
- [7] Rammbasa submitted further that on the 17th July 2009, he went back to the Registrar of this Court to check if the file had been found wherein he discovered that the matter had already been set down on the unopposed roll for the 20th August 2009. Rammbasa submitted further that service of documents was irregular as it did not comply with Rule 4 (1) (b) (vi) of the Rules of the Labour Court.

- [8] In terms of this Rule service on the State or Province is by serving a copy on a responsible employee in any office of the State Attorney or by any other means authorised by the Court.
- [9] This Court takes into account the fact that the applicant was unrepresented in this matter and the relevant processes involved in reviewing the arbitration awards seems to have confused her. However, the applicant conceded that she had sent the review papers to the first respondent itself and not through the office of the State Attorney. She further pleaded with this Court to determine the merits of her matter as she was struggling to survive because she continued to be unemployed with three children whose father had passed away.
- [10] This Court invited counsel for the first respondent to take instruction from her client to see if indeed this matter could not be finalised despite the difficulties that were associated with it taking into account the personal circumstances of the applicant. After this Court having stood down the matter to allow counsel for the first respondent to take instruction from her client, counsel indicated that the first respondent was ready to argue the matter as it was.
- [11] Accordingly, this Court made a ruling that the matter should be placed on the opposed roll and proceeded to hear the submissions of both parties on the merits of the review.

Background facts

- [12] The applicant was dismissed subsequent to being found guilty in a disciplinary hearing of a prohibited substance in the form of dagga inside the premises of

the Department of Correctional Services at Rooigrond Correctional Services on the 16th April 2005. The applicant had chosen to remain silent and did not put her version before the chairperson of the disciplinary hearing.

[13] On the 16th April 2005, the Acting Head of the prison at the time of the incident leading to the dismissal of the applicant Mr Ntwe ordered the morning parade for the prison wardens. It is alleged that the applicant and a certain Mr Mokoma entered the prison without attending the parade. Mr Ntwe then ordered that they be brought to his office. On their arrival he indicated that they would be searched as the prison was experiencing a serious problem with dagga being constantly found from the inmates.

[14] Two female officers were asked to search the applicant in another office. It is alleged that six bank plastic bags full of dagga were found on the person of the applicant. Mr Ntwe ordered that her house be searched but nothing was found. The applicant was removed from the first respondent's premises and criminal charges were pressed against her.

Grounds for review and arbitration award

[15] The applicant contends that she feels aggrieved because the arbitration hearing was unfair since the commissioner was biased and favoured the management side. In support of this contention the applicant states that the commissioner asked questions which were prejudicial to her case. The applicant further contends that no proof or evidence was given by the first respondent's witnesses during the arbitration hearing and that the first respondent's

witnesses contradicted themselves. The applicant further complains about the fairness of the sanction of dismissal.

[16] In his brief analysis of the evidence and correctly so the commissioner made it clear right from the beginning that the conflicting versions of what happened to the criminal proceedings instituted against the applicant and referred to during the arbitration proceedings had no bearing to the enquiry before him and that he was obliged to consider the matter involving the dismissal of the applicant which she alleged was unfair *de novo*.

[17] The commissioner in upholding the dismissal of the applicant as fair reasoned as follows:

“I have no hesitation in finding that the version of the respondent is far more credible and acceptable than that of the applicant.

I must point out that the applicant did not challenge crucial and critical aspects of the evidence of the witnesses called by the respondent. There were numerous examples hereof during the entire proceedings, and a few of them will suffice to illustrate the point. Mrs. Riekert never put her later version to the witnesses that she suddenly noticed the dagga on the table while undressing. She did not dispute that she started crying and begged Mrs Kgomonyane and Mrs Cingi to leave her alone. She did not challenge Mr. Ntwe when he testified that he had been informed that she had not attended the parade. She did not challenge his testimony that she admitted to him that the dagga was hers.”

The test for review

[18] The test for review is set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC). The enquiry is based on the reasonable decision-maker test. The purpose of the test is to determine whether the decision reached by the commissioner is one which a reasonable decision maker could not reach. In assessing the reasonableness of the award the Court takes into account the material evidence which was before the commissioner during the arbitration proceedings.

[19] In *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and others* [2008] 3 BLLR 197 (LAC), the Court emphasized that the reasonable decision maker's test:

“... is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objective of the Act and particular the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that the decision of the arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all circumstances, have reached.”

Evaluation

- [20] The record of the proceedings bears no support for the contention that the commissioner was biased. The commissioner was aware and took account of the fact the applicant was unrepresented during the proceedings. The commissioner explained to the applicant in great details the process involved from the opening statements, examination in chief, cross-examination and re-examination. Accordingly, the applicant complaint against the commissioner is unsustainable in my view.
- [21] The degree of proof required in arbitration proceedings is that a party (employer) to the dispute must prove its case on a balance of probabilities. Proof on a balance of probabilities in effect means that arbitrators or commissioners will weigh the respective cases of the two parties and the party whose version is more probable will win. The employer is required to prove on the balance of probabilities that the employee in fact committed the misconduct and that the dismissal was accordingly for a fair reason. The employer must also prove on the balance of probabilities that it had complied with the procedural requirements of the type of dismissal concerned. See *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC).
- [22] The second complaint by the applicant that no proof or evidence was given by the first respondent during the arbitration hearing in the form of the alleged dagga found on her or a forensic certificate indicating that the substance in

question was tested scientifically and found to be dagga bears no merit and is accordingly rejected.

[23] The essence of the third complaint by the applicants is that the first respondent's witness, Ms Kgomanyane testified during the arbitration hearing that she and Ms Cindi were asked by Mr Ntwe to conduct a body search on the applicant wherein they proceeded to the nearby office where the search was conducted. She testified that the applicant removed some of her clothing and that she found two packets of dagga in the jacket of the applicant and another four packets of dagga were found on the applicant by Ms Cindi. During the cross-examination Ms Kgomanyane was asked by the applicant to comment about the statement she made at the police station on the day of the incident when she said the applicant undressed herself, cried and took off four packets of dagga. Ms Kgomanyane could not comment.

[24] It is trite that in review the Court does not concern itself with the correctness of the decision of the commissioner but rather with the reasonableness of his or her conclusion. In my view the applicant has failed to make out a case warranting interference with the commissioner's award by this Court.

[25] Turning to the last complaint levelled against the commissioner that the sentence was not fair, equitable and consistent if compared with other decided cases, there was no evidence led with regard to this aspect. Even the heads of argument prepared by the applicant's attorney at the end of the hearing of this matter does not deal with this aspect at all. I am accordingly unable to fault the

commissioner in this regard. I am also unable to fault the commissioner with regard of his finding that the applicant did not challenge crucial and critical aspects of the evidence of the witnesses called by the respondent and that her versions were not put to them.

[26] The evidence of Mr Ntwe that as the acting head of the prison at the time, he addressed morning parades every Saturday and Sundays and that he persistently told everyone including the applicant that no one was allowed to go into the prison before the parade was finished remained unchallenged. So the argument of the applicant that on the day in question she was not aware or she was not told that she was supposed to attend the parade stand to be rejected and the analysis of the commissioner in this regard cannot be faulted.

[27] There is further no merit in the argument of the applicant that the dagga in question was not scientifically tested and accordingly the first respondent's witnesses could not say with certainty that it was dagga. The applicant's versions that she suddenly noticed the dagga on the table while she was undressing was correctly rejected by the commissioner because it was not put to the first respondent's witnesses and is unbelievable.

[28] In the circumstances, I am of the view that the award of the commissioner cannot be faulted for being unreasonable.

[29] In the premises I make the following order:

- (i) The application to review and set aside the arbitration award issued under case number PSGA 170-06/07 dated 20th March 2008, is dismissed.

(ii) There is no order as to costs.

Molahlehi J

Date of Hearing : 20th August 2009

Date of Judgment : 27th November 2009

Appearances

For the Applicant : Mrs C Rickert (in person)

For the Respondent: Adv T A N Makhubele

Instructed by : The State Attorney