

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

REPORTABLE

CASE NO: JR1335/09

AND JR1756/09

In the matter between:

**DEPARTMENT OF CORRECTIONAL
SERVICES**

Applicant

AND

SIBEKO Z S N.O

1st Respondent

GPSSBC

2nd Respondent

POPCRU obo NGWENYA M S S

3rd Respondent

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside the arbitration award of the first respondent (the commissioner) issued under case number PSGA344-08/09, dated 30th April 2009. In terms of the arbitration award the commissioner found the dismissal of the third respondent (the employee) to have been unfair and ordered that he be reinstated. The leave to appeal in this matter is decided on the written submissions made by the parties.
- [2] The employee has filed an application in terms of s 158 (1) (c) of the Labour Relation Act 66 of 1995 (the LRA), in terms of which he seeks an order making the arbitration award an order of court.

Background facts

- [3] The background facts in this matter are generally common cause. The employee who was prior to his dismissal employed as a correctional officer was dismissed for leaving a prison gate opened resulting in the escape of one of the prisoners. At the disciplinary hearing the employee pleaded guilty and was for that reason dismissed.

- [4] The employee being unhappy with the outcome of the disciplinary enquiry referred an unfair dismissal dispute to the second respondent for conciliation and subsequent to that to arbitration.
- [5] At the arbitration hearing, pursuant to the agreement between the parties, witnesses were not called to support their respective cases. The parties agreed that the commissioner should make his determination on the basis of the submissions made by the respective representatives of each party. The minutes of the disciplinary hearing was never placed before the commissioner neither was he required to have regard to what transpired at the disciplinary hearing.

The grounds for review and arbitration award

- [6] The grounds for review are set out in the founding affidavit of the applicant as follows:

- “10.1 *The applicant’s representative in the disciplinary hearing did not make any submissions that the relationship of trust had not broken down this is not borne out by the minute of a disciplinary hearing.*
- 10.2 *The applicant’s representative in the disciplinary hearing did not propose or ask for a sanction of a final warning. She requested for more serious sanction of a demotion as apparent from the minute of the disciplinary hearing.*
- 10.3 *The first respondent did not give any regard to the seriousness of the misconduct, notwithstanding that it is apparent from the minute of the disciplinary hearing that the applicant regards the misconduct as a serious matter.*
- 10.4 *The first respondent gave undue weight to the fact that the applicant’s representative in the disciplinary hearing did not seek dismissal of the employee as if the presiding officer is obliged to accede to the sanction proposed by the employer.”*

The applicant further contends that the commissioner’s award is reviewable on the grounds that it is unreasonable.

[7] In considering whether the dismissal was a fair sanction the commissioner firstly, in his analysis of the submissions which had been made by the parties correctly observed that the onus was on the applicant to show that the dismissal was fair. The commissioner further accepted the submission of the employee that the applicant represented by the chairperson of the disciplinary hearing failed to take into account the mitigating factors in arriving at his decision to dismiss the employee. The commissioner further reasoned that the dismissal was unfair because there was no proof that the trust relationship between the parties had broken down. It seems one of the factors which influenced the commissioner in arriving at the conclusion that the trust relationship had not broken down is the finding that the applicant had suggested that the employee be issued with a final written warning which the applicant disputes.

Evaluation

[8] In assessing whether or not to interfere with the commissioner's arbitration award the following need to be noted:

- No evidence was led by any of the parties at the arbitration hearing;
- The transcript of the disciplinary hearing was not placed before the commissioner at the arbitration hearing;
- The commissioner was required to assess the fairness of the sanction imposed on the basis of the submissions made by parties during the arbitration proceedings;
- The transcript of what was said by the parties in their submissions during the arbitration hearing is not before this court. It therefore means the court is confined in its assessment as to whether or not it should intervene by what is stated in the arbitration award.

[9] The counsel for applicant argued that the commissioner's award was unreasonable because notwithstanding the seriousness of the offence committed by the employee and that the employer had previously dismissed other employees who committed similar offences the commissioner found the dismissal to have been unfair and ordered the reinstatement of the employee. The submission is, in my view, unsustainable regard being had to what is stated

above that no evidence was led regarding the merits of the dispute neither was the transcript of the disciplinary hearing placed before the commissioner.

[10] In support of her submission that the arbitration award was unreasonable counsel for the applicant relied on the decisions of ***Toyota South Africa Motors (Pty) Ltd v Radebe and Others 2000 (3) BLLR 234(LAC)***, ***Standard Bank v CCMA 1998 6 BLLR 622 AT (LC)*** at paragraph 21, and ***Mondi Kruft (Pty) Ltd v PPAWAWU & Others 1999 10 BLLR 1057 (LC)*** at paragraph 17. It is now well established that the test to apply in review is that of reasonable decision maker as enunciated in ***Sidumo v Rustenburg Platinum Mines 2007 12 BLLR 1097 (CC)***. It is clear from the papers that the task of the commissioner was limited to having to assess the fairness of the sanction imposed by the applicant.

[11] In my view this matter has to be considered within the confinement of the terms of the agreement which spelt out the task of the commissioner and in context where no evidence was led, particularly by the employer who had the duty to show that the dismissal was for a fair reason or that the sanction was fair.

[12] The burden to show that a dismissal was for a fair reason rest with the employer. Similarly, the duty to show that the dismissal was a fair sanction in the circumstances rests with the employer. The employer discharges its burden of proof by adducing evidence to support its version that the dismissal was for a fair reason and by also showing that in the circumstances of the case a fair sanction is dismissal.

[13] In the present instance as indicated earlier, no evidence was placed before the commissioner regarding the fairness of the dismissal or the sanction for that matter. The only common cause facts placed before the commissioner in terms of what is stated in the arbitration award and upon which the fairness of the sanction was to be determined can be summarized as follows:

- The employee pleaded guilty to the charge of leaving a gate unlocked resulting in the escape of one of the prisoners;
- The prisoner who had escaped a result of the conduct of the employee was rearrested on the same day;

- The employee was suspended and called back to work after the completion of the investigation.

[14] The applicant's first ground of review is unsustainable because the minutes of the disciplinary hearing was never placed before the commissioner. And more importantly in as far as this ground is concerned the applicant never led evidence regarding the break down in the trust relationship. In other words the applicant has failed to discharge its burden of showing that the trust relationship has broken down as a result of the conduct of the employee.

[15] The second ground is also unsustainable because it is based on what happened at the disciplinary hearing, the evidence of which as indicated above was never placed before the commissioner. In any case the observation of the commissioner in this respect is irrelevant because there is no evidence suggesting that the employee was demoted.

[16] I am also of the view that there is no merit on the fourth ground of review. Similarly, there is no merit to the fifth ground of review. There is no evidence that in their submission or in the agreement between the parties it was agreed that should the commissioner find the dismissal sanction to be unfair then he should consider imposing another sanction.

[17] In the light of the above discussion the applicant's application stands to fail. And as concerning costs I see no reason in law and fairness why they should not follow the results.

[18] As concerning the application to make the arbitration award an order of court, I am satisfied that the third respondent have made out a case to have the award made an order of the court.

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

1. The application to review and set aside the arbitration award issued under case number PSGA 344-08/09 is dismissed with costs.
2. The arbitration award under case number PSGA 344-08/09 is made an order of this court in terms of s 158 (1) (c) of the Labour Relations Act 66 of 1995.

Molahlehi J

Date of Hearing : 21st September 2010

Date of Judgment : 21st October 2010

Appearances

For the Applicant : Adv JJ Bason-instructed by :Grosskope Attorneys

For the Respondent: MMS Baloyi- instructed by the State Attorney