



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1006/11

In the matter between:

KHOMOTSO CHRISTINA MABITSELA

Applicant

and

Department of Local Government

& Housing

First Respondent

GPSSBC

Second Respondent

MR SEOPELA

Third Respondent

Heard: 24 January 2011

Delivered: 07 February 2012

Summary: Review application – the right to interpretation.

JUDGMENT

MOLAHLEHI J

Introduction

1]This is an application to review and set aside the arbitration award made by third respondent (the arbitrator) under case number GPBC1028/2011 dated 18 March 2011. In terms of that arbitration award, the arbitrator found the dismissal of the applicant on charges of fraud to have been both procedurally and substantively fair.

2]The review application was unopposed.

Background facts

3]Mrs Mabitsela, the applicant in this matter was together with her immediate superior, Dr Sefala charged with an offence related to fraud. Both Mrs Mabitsela and Dr Sefala are employed in the Department of Local Government and Housing and were responsible for the transfer and registration of property. They were both charged with fraud relating to the illegal transfer and registration of a property. The property in question is site number 268E in Seshego.

4]According to Mrs Mabitsela, the site ran into arrears in terms of payment of rates and taxes. Because of this, the local authority had placed the property on auction.

5]It would seem Mr Mabitsela, the husband to the applicant concluded an agreement to purchase the property from the owner. Mrs Mabitsela says her role in this transaction was limited to having to sign the relevant purchase documents as she and Mr Mabitsela are married in community of property.

6]Mrs Mabitsela says that they later after purchasing the property but before it

was registered in their names, decided to sell it because of the rising costs of rates and taxes. The site was sold to Mr Sebola by the Mabitselas.

The grounds of review

7]Mrs Mabitsela contends that the arbitration award is reviewable because:

- -the arbitrator incorrectly said that she did dispute the charge of fraud against her.
- the sanction of dismissal was too harsh
- the arbitrator failed to take into account that it was not her who cheated but Mr Maredi and Mr Magano
- the arbitrator required to mitigate before she was informed of the outcome of the disciplinary hearing
- the notice of dismissal was sent to PSA which is not her union and was not represented by it.

8]The applicant further complained that the arbitrator interfered with the proceedings and would regularly switch off the tape so that her arguments would not be recorded. The complaint of Mrs Mabitsela is that there are instances where the arbitrator would remain behind with the first respondent and have discussions.

9]The other submission made by Mrs Mabitsela is that the arbitration award is reviewable because the arbitrator deferred to the decision of the chairperson of the disciplinary hearing in that his award is the same as that of the chairperson of the disciplinary hearing.

The arbitrator's arbitration award

- 10]Under the heading “Background Facts” the arbitrator notes that the case of the applicant was that the first respondent was not consistent in the application of its policies because the respondent had decided to charge accomplice, Dr Sefala with a lesser offence of gross negligence whilst she was charged with fraud.
- 11]In finding that the dismissal was procedurally fair, the arbitrator rejected the contention of the applicant that the procedure was unfair because the first respondent had addressed the notice of termination of employment to the PSA and not to herself.
- 12]As concerning the delay in communicating the decision to terminate the applicant's employment by five days the arbitrator found that that was not unfair as the applicant failed to show that she was prejudiced by that delay.
- 13]As concerning substantive fairness, the arbitrator rejected the contention of the applicant that the first respondent had inconsistently applied the disciplinary procedures. The arbitrator in rejecting the applicant's contention held that: ‘the applicant and Dr Sefala did not commit the same offences to receive the same sanction’

Evaluation

- 14]It is important to mention that no evidence was led in this matter. Although it is not clear from the record, it seems that before the hearing commenced some sort of an agreement was reached between the representatives of the parties. The key agreement seems to have been that the applicant conceded to the charge of fraud and that she was to challenge only the inconsistent application of the discipline by the first respondent.
- 15]The applicant challenges the arbitration award of the arbitrator on the basis that she was not provided with the assistance of an interpreter although she had requested for such assistance. She submits in this respect that she could not follow the proceedings.

16] The right to have the proceedings interpreted is well set out and has received attention in the criminal law field both in our jurisprudence and internationally. In this respect section 35 [3] [K] of the Constitution provides that an accused person has a right to a fair trial which includes the right to be tried in a language that an accused person understand or if that is not practicable to have the proceedings interpreted in that language. The right to interpretation is a key element of both the right of access to courts and the independent impartial dispute resolution bodies as provided for in terms of section 34 of the Constitution. This principle is also found in article 14 of the International Covenant on Civil and Political Rights (ICCPR) which provides:

‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charges against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by the law.’

17]The Principle and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provided for in the African Charter for Human Right (ACHPR), which our country has ratified, provides amongst others that:

‘2 (g) an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body.’

18]In terms of the principle of access to courts and other independent dispute resolution bodies as set out in section 34 of the Constitution, there is a positive obligation on those conducting proceedings to inform litigants of their rights and entitlement to interpretation when proceedings are conducted in a language other than their own and when they would not be in a position to understand the proceedings when conducted in any other language. The duty is less onerous when a litigant is represented by someone else during the proceedings. In that instance the arbitrator can reasonably assume (unless the representative raises the issue of the need for an interpreter) that same is not necessary. However the duty remains intact where the request for interpretation is made even where the litigant is represented.

19]Thus failure to ensure that a party in an arbitration hearing enjoys the right to be assisted in participating and understanding the proceedings axiomatically, is a denial to a fair hearing which must render those proceedings reviewable.

20]In the present instance, the request for interpretation was made in writing to the CCMA by the applicant in the letter dated 27 July 2010 which reads as follows:

‘APPLICATION FOR AN INTERPRETOR

I wish to apply for an interpreter for the hearing on arbitration on the date to be set who will interpret in my mother tongue North Sotho.’

21]In the face of the above letter, the arbitrator was duty bound to ensure that the services of an interpreter was made available to the applicant. It seems to me that had the interpreter been made available, the applicant would have appreciated the import and the implications of the concession which her representative was making on her behalf and in all probabilities would have objected and withdrawn his mandate.

22]The other ground upon which the arbitration award stands to be review concerns the other allegations made against the arbitrator. The arbitrator is accused of several acts of misconduct and irregular manner in which he conducted the proceedings. These allegations have not been denied by any of the respondents and in particular the arbitrator. Reading through the record there is no reason to doubt the truthfulness of the complaints against the arbitrator made by the applicant. The main complain in this regard is that the arbitrator had private discussions with the representatives of the other side.

23]In light of the above, I am of the view that the arbitrator committed misconduct and gross irregularity which have vitiated the arbitration award.

24]In the premises the following order is made:

1. The third respondent’s arbitration award is

reviewed and set aside.

2. The matter is remitted back to the second respondent to be considered afresh by an arbitrator other than the third respondent.
3. There is no order as to costs.

Molahlehi J

APPEARANCES:

FOR THE APPLICANT: Dan Gobile instructed by: Karabo Labour Organisation

FOR THE FIRST RESPONDENT: No appearance.