



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR448/05

In the matter between:

RLN BULA

Applicant

and

THE PREMIER OF THE NORTHERN CAPE

GOVERNMENT

First Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Second Respondent

ME MARAIS NO

Third Respondent

Heard on: 15 December 2011

Delivered on: 15 March 2012

Summary: The applicant challenged the commissioner's award that he was properly discharged from service as the Head of the Department and not the Chief Director. The review application failed because of the documentary evidence pointing to the applicant's position as the HOD and not the Chief Director as the applicant alleged.

JUDGMENT

SESELE AJ

Introduction

- [1] This is an application for the review and setting aside of the arbitration award and for an order substituting the award with an order that the dismissal of the applicant was procedurally and substantively unfair. Alternatively, that the matter be referred back to the second respondent to be heard by a commissioner other than the third respondent and costs against the first respondent.

Background facts

- [2] The applicant was the Head of the Department for the Department of Public Works, which included the Department of Safety and Security.
- [3] The first respondent discharged the applicant from service effectively from 1 July 2004 in terms of section 12 of the Public Service Act, (the “PSA”).¹
- [4] At the arbitration hearing, the applicant’s case was that he was no longer the Head of the Department at the date of his discharge from service. The first respondent’s case was to the contrary.
- [5] The third respondent found in her award that the applicant was indeed the Head of the Department and that the dismissal was therefore properly effected in terms of section 12 of the PSA.

Grounds for review

- [6] The applicant contends that the third respondent committed misconduct in relation to the duties of a commissioner in that she failed to duly and properly apply her mind and failed to consider the law of evidence and the burden of proof during the arbitration proceedings.
- [7] The third respondent is alleged to have based her finding that the applicant was the Head of the Department solely on documents handed in by the first

¹ 103 of 1994.

respondent's representative without there being any witness' testimony to that effect.

- [8] The applicant also contends that the third respondent committed gross irregularity by not applying her mind to the applicant's evidence on why the applicant referred to himself as the Head of the Department in the proceedings before the Northern Cape High Court, Kimberley.
- [9] the last contention is that the third respondent grossly erred by not considering that the applicant's position of Head of the Department was withdrawn and that the applicant remained the Chief Director on instructions from the responsible Member of the Executive Council.

Submissions

- [10] The applicant contends that he was the Chief Director and not the Head of the Department as defined in terms of Section 12(1)(a) of the PSA thus making material error of law by finding that section 12 of the PSA was applicable to the applicant.
- [11] The first respondent submits that the applicant, in his letter of 16 October 2001 disputed that he is the Head of the Department in terms of section 12(1)(a)(i)(aa) but is an officer referred to in section 12(1)(a)(i)(bb) of the PSA.
- [12] The applicant further regarded himself as the Head of the Department in the affidavit which he deposed to on 26 May 2003 in the proceedings before the High Court.
- [13] The applicant contends that the third respondent only had the applicant's evidence under oath and none from the first respondent at the arbitration hearing. The third respondent refused to accept the applicant's uncontested evidence but accepted the first respondent's version without providing any reasons.
- [14] The first respondent contends that the applicant's evidence at the arbitration proceedings is in direct contrast to the position he took in the letter of

16 October 2001 and the affidavit in the High Court to the effect that he was the Head of the Department.

- [15] The applicant submits that the third respondent accepted a document and arrived at a decision based on the document without any witness laying the basis for the document.
- [16] The first respondent contends that the documents formed part of the bundle handed in at the arbitration hearing and there was no objection thereto. The documents also formed part of documents which were attached to the applicant's founding affidavit. It is not irregular for the third respondent to consider the correspondence addressed to the applicant and his response thereto.
- [17] The applicant contends that the third respondent failed to interpret the documents correctly and apply her mind to the *rationale* of the letter and its context.
- [18] The third respondent failed to consider that the first respondent did not present the five year employment contract but solely relied on the disputed documents.
- [19] The first respondent submits that the applicant's evidence in chief is improbable in light of the documents and correspondence attached to his founding affidavit.
- [20] The first respondent submits that the applicant was the officer referred to in terms of section 12(1)(i)(bb) of the Public Service Law Amendment Act of 1997 and his position as the Head of the Department had expired and the applicant was thereafter retired in terms of section 16(3)(a).

Analysis

- [21] It is trite that the test for review is formulated in *Sidumo and Another v Rustenburg Platinum Mines LTD and Others*² as whether a reasonable

² ²[2007] 28 ILJ 2405 (CC).

decision-maker would have arrived at the conclusion reached by the commissioner based on the evidence presented.

- [22] Whether a mistake in law may sustain a successful review application it was held in *Purefresh Foods Pty Ltd v Dayal and Another*³ that a mistake must have perpetrated an injustice. If a party was deprived of a fair hearing or a commissioner did not apply his mind to the matter before him or her or that the commissioner ignored direct evidence and relied on evidence that is not placed before him, such a mistake may be a ground for review.
- [23.] In one of the judgments delivered after *Sidumo*, namely *Edcon Ltd v Pillemer NO and Others*⁴ it was said that the determination of reasonableness of the award focuses on the conclusion of the commissioner based on the evidence placed before the commissioner.
- [24] Where a party in a review application avers that the commissioner relied on hearsay evidence in arriving at a particular conclusion, the Court in *Naraindath v CCMA and Others*,⁵ said that it is not an irregularity if the commissioner has satisfied himself or herself on proper grounds that the particular evidence is reliable. The commissioner's conduct will not be reviewable.
- [25] In the case under consideration, the responsible Member of the Executive Council (the "MEC") advised the applicant in writing on 15 October 2001 that the latter's five year term of employment as the Head of the Department in terms of section 12(1)(a)(aa) of the PSA expired on 1 July 2001. Further that the applicant would remain employed as the Chief Director. In response thereto the applicant pointed out to the MEC on 16 October 2001 that the latter misunderstood section 12 of the PSA as the applicant claimed to fall under section 12(1)(a)(i)(bb) and not section 12(1)(a)(i)(aa) as the MEC alleged.

³ [1999] 5 BLLR 518 (LC).

⁴ [2008] 5 BLLR 391 (LAC).

⁵ [2000] 6 BLLR 716 (LC).

- [26] On 24 October 2001, the MEC suspended the applicant by a letter addressed to the applicant as the Chief Director.
- [27] On 12 November 2001, the Premier issued a notice of a disciplinary hearing to the applicant in which the following paragraph appears to shed some light on the position of the applicant at the material time: 'WHEREAS you are a Senior official and was the head of the department of Safety and Liason, Northern Cape Province...' This notice was issued within less than a month after the MEC had suspended the applicant who the MEC regarded as the Chief Director in the letter of 24 October 2001. It therefore means that in November 2001 the Premier regarded the applicant as the Head of the Department.
- [28] On 14th July 2004, the Chief State Law advisor wrote a letter to the Acting HOD, Safety and Liason to the effect that the term of office of the applicant as the Head of Department ended on 30 June 2004.
- [29] On 15 July 2004, the Premier wrote the letter to the applicant which I quote hereunder:

'EXPIRY OF TERM OF OFFICE AS HEAD OF DEPARTMENT

You are hereby informed that in accordance with section 12 of the Public Service Act, 1994 (the Act) you were appointed for a period of 5 years as from the date of commencement of the Public Service Laws Amendment Act (i.e. 1 July 1999).

The said period having expired, section 16(3)(b) of the Act applies, which stipulates that the Head of the Department must be deemed to be discharged in terms of section 17(2)(b) of the Act.

You are accordingly discharged in terms of the above provisions.'

- [30] The applicant himself on 26 May 2003 in the affidavit before the Northern Cape High Court Kimberley says in paragraph 6.3:

'Presently I occupied a post of Chief Director and Head of Department: Safety and Liason, Northern Cape Government.'

- [31.] The applicant's explanation at the arbitration hearing is that the incident of sexual harassment took place during 2000 when he was Head of the Department. The applicant however deposed to the affidavit on 26 May 2003 and confirmed that he is the Head of the Department on the said date. It is improbable that the applicant would have described himself as the Head of the Department if the MEC had removed him from the position of the Head of the Department.
- [32.] In my view, it is apparent from the MEC's letters to the applicant that the former wanted to change the applicant's position to that of the Chief Director. This did not materialise. What is decisive is that the Premier in the letter of the discharge of the applicant referred to the applicant as the Head of the Department.
- [33] The applicant's position as the Head of the Department, so the third respondent found, did not change at any stage prior to 1 July 2004 on which date the Premier discharged the applicant from service. The third respondent made this conclusion based on the documentary evidence presented before her. This decision is, in my view, a decision which a reasonable decision-maker would have arrived at (*Sidumo and Another v Rustenburg Platinum Mines LTD and Others* [2007] 28 ILJ 2405 (CC)).
- [34] I am also satisfied that the third respondent relied on the documents placed before her after satisfying herself as to the reliability of such documents before making the decision and that the conduct of the third respondent in this regard is therefore not reviewable (*Naraindath v CCMA and Others* [2000] 6 BLLR 716 (LC)). Some of the documents namely the letter of 16 October 2001 to the MEC and the affidavit before the High Court were written by the applicant or on his instructions. The third respondent did not make a mistake of law or fact insofar as the position of the applicant was concerned. The circumstances of the case are such that I did not consider it fair to make a cost order.

[33] Order:

- (1) The application to review and set aside the award of the third respondent under case number: PSGA534-04/05 issued on 17 January 2005 is dismissed; and
- (2) There is no order of costs.

SESELE AJ

APPEARANCES:

FOR THE APPLICANT: Adv. Grobler instructed by Lovius Block Attorneys

FOR THE RESPONDENT: Adv. C Malema instructed by the State Attorney