



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2688/09

In the matter between:

RANDFONTEIN LOCAL MUNICIPALITY

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

1st Respondent

COMMISSIONER S KHOZA NO

2nd Respondent

SAMWU

3rd Respondent

T LUTHERS AND ANOTHER

4th Respondent

Date of application: 11 July 2012

Date of judgment: 19 September 2012

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent ('the commissioner') under case number GPD 100721 on 13 July 2009. In her award, the commissioner found that the dismissal of Messrs Luther and Marite (cited jointly as the fourth respondent in this application and to whom I shall refer as 'the employees') was substantively unfair. The commissioner ordered their reinstatement with retrospective effect.
- [2] The proceedings under review concerned allegations of misconduct made against the employees. These related to alleged breaches of terms and conditions of employment in the form of a failure to perform work diligently and in particular, their failure to discharge responsibilities of the employees for the preparation of VAT calculations and payments.
- [3] In her award, the commissioner found that the employees had provided an explanation for their conduct and on the basis that their evidence in this respect had not been challenged by the applicant in the arbitration hearing, she concluded that the employees' dismissal was substantively unfair.
- [4] The arbitration award under review incorporates a prior jurisdictional ruling made by the same commissioner. The background to that ruling is of some significance to the present proceedings and is briefly the following.
- [5] The employees had contended that the disciplinary hearing that they were required to attend was irregularly constituted. In particular, they challenged the appointment of an outside chairperson, an attorney, on

the basis that the applicable collective agreement did not contemplate or authorise the appointment. On or about 3 August 2005, the employees referred a dispute to the bargaining council concerning the interpretation and application of the relevant collective agreement. On 12 September 2005, the bargaining council issued a certificate to the effect that a dispute concerning the interpretation and application of a collective agreement remained unresolved.

[6] On 4 October 2005, the employees were found guilty of the charges against them and dismissed.

[7] On 11 October 2005, the employees referred a dispute to the bargaining council for conciliation, categorising the dispute as one concerning an unfair dismissal and contending that the applicant had utilised an inappropriate procedure in effecting the dismissal. The terms of the referral made to the bargaining council categorised the dispute as one concerning an unfair dismissal. In relation to the procedures followed, the employees state that "*the respondent acted inappropriately by utilising an inappropriate disciplinary tribunal committee against that the collective agreement about the disciplinary procedure.*" In relation to the desired outcome, the employees recorded that they wished to be reinstated with retrospective effect.

[8] On 26 October 2005, the employees referred a dispute to the bargaining council arbitration where the issue in dispute was defined as the '*alleged interpretation/application of collective agreement*'. The dispute concerned that part of the collective agreement that regulated disciplinary procedures, and in particular, the appointment of persons to share disciplinary hearings. At issue was the right of the applicant to appoint an independent professional person to chair the disciplinary hearing. The relief sought by the employees was that the arbitrator nullifies the findings of the disciplinary hearing and that the hearing be reconstituted in compliance with the employees' understanding of the terms of the collective agreement. The referral was made under case number GPD 080511.

[9] The arbitration was held on 29 November 2005. On 15 December 2005 commissioner Sekhabisa issued an arbitration award in which he found that the applicant was entitled in terms of the relevant provisions of the collective agreement to appoint a legal practitioner to preside at a disciplinary hearing after a review of the evidence, commissioner Sekhabisa concluded that the applicant had discharged the onus of proving a fair reason for dismissal and that it had followed a preferred procedure in dismissing the employees. The commissioner issued the following award:

‘1. *The applicants dismissal was both substantively and procedurally fair.*

2. *I hereby dismiss the application brought by the applicants.*

3. *No order as to costs is made.*’

[10] On 10 April 2008, the bargaining council issued a certificate of outcome recording that as at that date, the unfair dismissal dispute referred by the employees remained unresolved. On 14 April 2008, the employees referred a dispute to arbitration under the auspices of the bargaining council. The dispute concerned the unfair dismissal of the employees and their claim for retrospective reinstatement. The dispute was categorised as one concerning an unfair dismissal.

[11] In the subsequent arbitration hearing before commissioner Khoza, the applicant raised a point *in limine* that the matter was *res judicata* and the bargaining council did not have jurisdiction to arbitrate the dispute. The applicant submitted that the issue referred to arbitration had already been the subject of an award issued by the commissioner Sekabisa under case number GPD 080511. The award rendered the matter that the employees referred to arbitration *res judicata*

[12] Commissioner Khoza issued a ruling on 23 August 2008. She ruled that the applicant ought to have raised the issue of *res judicata* at the time of conciliation, prior to the issuing of a certificate of outcome. On the basis of the judgement of the Labour Appeal Court in *Fidelity Guards*,

the commissioner held that although the issuing of a certificate of outcome is an administrative act, it acquires the force of law if left unchallenged within a reasonable period of time. The employees' failure to challenge the validity of the certificate within a reasonable time had the effect that the certificate remained valid. The certificate conferred jurisdiction on the bargaining council to arbitrate the unfair dismissal dispute referred by the employees. After the ruling, the arbitration proceedings and then resumed, culminating in the award that is the subject of these proceedings.

[13] The applicant was raised three grounds for review. The first is that the commissioner committed misconduct in relation to her duties as arbitrator; secondly, that she committed a gross irregularity in the conduct of the arbitration proceedings; and thirdly, that she exceeded her powers as commissioner. In relation to the first ground, the applicant avers that the commissioner committed misconduct in that she ruled that she had jurisdiction in circumstances where the issue referred to arbitration had already been decided upon. (In other words, the *res judicata* point. There is also an averment relating to the failure of the commissioner to recuse herself when called on to do so, but this issue was not seriously pursued).

[14] The basis of the averment relating to gross irregularity appears to concern an alleged failure by the commissioner to take into account the fact that the employees failed to give evidence in the disciplinary hearing, and that they showed disrespect to the applicant by walking out of the hearing. The applicant conceded this was not an issue before the commissioner. It is trite that an arbitration hearing is a hearing *de novo*. Whether or not the employees gave evidence at the disciplinary hearing is of no consequence. During the arbitration, the applicant led only the evidence of the externally appointed attorney who had prosecuted the hearing on behalf of the applicant. The employees' evidence, in which they provided an exculpatory explanation for the errors in the VAT calculation, was not challenged, nor was it dealt with in the evidence presented by the applicant. For

these reasons, there is no merit in this ground for review. Similarly, to the extent that the ground of irregularity and/or bias extends only to the applicant's complaint that the commissioner made factual findings in favour of the employees, this is not a matter that ordinarily stands to be canvassed under the umbrella of gross irregularity as a ground for review but for the reasons recorded above, in any event, it has no merit. In short, the only ground for review that has any potential merit is that concerning the applicant's plea of *res judicata*.

[15] Here, the applicant's contentions are misconceived. The applicable test is not one that is rooted in s 145 of the LRA, or in the concept of reasonableness. This court is required to determine the correctness or otherwise of the commissioner's ruling. The jurisdictional ruling was issued in August 2008. It was not challenged at the time, nor was any reference made to it at the commencement of the arbitration hearing, not even in the form of a reservation of rights. Indeed, it is only in the founding affidavit in the present application that the ruling is obliquely attacked, as an element of the broader contention that the commissioner had committed gross misconduct in relation to her duties.

[16] To the extent that the commissioner's finding in the jurisdictional ruling is that the applicants had failed to raise the jurisdictional issue within a reasonable time and was thus precluded from doing so, her finding is consistent with the authority on which she relied (*Fidelity guards Holdings (Pty) Ltd v Epstein NO & others* (2001) 21 ILJ 2382 (LAC), and the later authority of *Bombardier Transportation (Pty) Ltd v Mtiya NO & others* (2010) 31 ILJ 2065 (LC). Even if the certificate of outcome did not confer jurisdiction on the council to arbitrate the dispute, the applicant's failure to challenge the jurisdictional ruling within a reasonable time was fatal.

[17] More fundamentally though, as stated above, the dispute about the application and interpretation of the collective agreement was conciliated before the employees were dismissed. It follows that the

fairness of their dismissals could never have been an issue that was required to be determined at arbitration. The employees accept that in the request for arbitration (which was made after the dismissals) they sought a ruling that the dismissals be nullified. But this is clearly a consequence of the primary ruling that they sought in the arbitration hearing, i.e. that the chairperson had been irregularly appointed. It was therefore not open to commissioner Sekhabisa to make any ruling concerning the fairness of the dismissals.

[18] In short: in making her jurisdictional ruling, the commissioner came to the correct conclusion. There is nothing in the record in in the terms of the record of the later arbitration proceedings or in her award that reflects that she misconducted herself or committed any gross irregularity. The decision to which she came regarding the fairness of the employees' dismissal is clearly one which, on the available evidence, falls within the band of decisions to which reasonable decision makers could come. The application accordingly stands to be dismissed.

[19] In so far as the question of costs is concerned, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. I must necessarily take into account the delay in prosecuting this review. The record was filed only in January 2011 (the application having been filed on 19 October 2009), without any explanation for the delay. For these reasons, the applicant ought to pay the respondents' costs. The dismissals that are the subject of this application were effected almost seven years ago. In my view, the application was misguided, and the applicant has itself to blame for the consequences of my ruling.

I make the following order:

1. The application is dismissed, with costs.

Andre van Niekerk

Judge of the Labour Court

Representation

For the Applicant: Mr. Kubayi, Novani Eddie Kubayi Inc.

For the Respondent: Adv FJ Nalane, instructed by Cheadle Thompson &Haysom