



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 925/09

In the matter between:

MINISTER OF CORRECTIONAL SERVICES

Applicant

and

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

1st Respondent

JOSEPH M MASEKONO

2nd Respondent

PUBLIC SERVICE ASSOCIATION

Obo EMSHABANGU

3rd Respondent

Date of application: 10 August 2012

Date of judgment: 20 September 2012

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the second respondent (the commissioner) on 17 January 2009 under case number PSGA 633 – 08\09. In his award, the commissioner concluded that the demotion of the employee on whose behalf the third respondent acts (Shabangu) was unfair.

Factual background

- [2] The material facts are not in dispute, and are summarised in some detail in the arbitration award under review. Shabangu was employed by the applicant at the Nelspruit Correctional Centre. On or about 7 June 2007 he was charged with contravening resolution 1 of 2006, in that he had allegedly poorly or inadequately discharged his duties for reasons other than incapacity' by failing to check and control fingerprints of an awaiting trial offender. The incident that was the subject of the allegations against Shabangu concerned an exchange of cards in circumstances where the offender was in possession of a card indicating that he had been granted bail. The card was that of another offender, who had been granted bail and was to be released. It was common cause that Shabangu was the most senior checker at the time the incident occurred. After a disciplinary enquiry, Shabangu was found guilty and demoted from the position that he held immediately prior to the incident that gave rise to the charges against him.
- [3] Shabangu disputed the fairness of his demotion and the matter was ultimately referred to arbitration before the commissioner. The issue before the commissioner was whether the applicant had committed an unfair labour practice by demoting Shabangu as a consequence of the misconduct that he

was alleged to have committed. Shabangu's defence in the arbitration hearing was that he could not be guilty of any failure to check and control fingerprints since he had not been trained to read fingerprints, nor had he had been trained to analyse or compare them. It was not disputed that Shabangu had never undergone any training in this regard.

The applicable legal principles

- [4] In broad terms, the test to be applied in the present instance is whether the conclusion reached by the commissioner is one that falls outside of the band of decisions to which a reasonable commissioner could come on the available material (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ to 405 (CC)). The Labour Appeal Court has recently affirmed that it does not necessarily follow that the reasonableness requirement is limited to outcome. In other words, an arbitration award will be reviewable if it suffers from process-related unreasonableness. So, for example, if a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. This is so because the proper consideration of the relevant and material facts and issues is a pre-requisite to a reasonable decision, and if a decision maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable (see *Herholdt v Nedbank Ltd* (DA 20/10, 4 May 2012 at paragraph [39] of the judgment, and *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC)). To the extent that the applicant's grounds for review are process-related, I intend to apply this approach.

The commissioner's award

- [5] In his award, the commissioner recorded that Shabangu's records did not disclose that he had been trained in the reading and analysis of fingerprints. The commissioner then set out in some detail and analysis of item 9 of schedule 8 to the Labour Relations Act, a provision dealing with the work

performance. The commissioner found, amongst other things, that the applicant had failed to prove that he had given the necessary training and that Shabangu could have been expected to have discharged the duty concerned. On this basis, the commissioner discounted evidence that Shabangu had performed duties relating to a custodian and keeper of detainees and offenders. The commissioner's reasoning is best disclosed by his conclusion which reads as follows:

‘(1) The employee cannot be found guilty for failing to do something that he had not been trained to do – especially after the employer's key witness testified that this is a technical aspect of the work that can only be done by a skilled individual;

(2) The verdict was not informed by the provisions of schedule 8 of the LRA and in terms of the case law above, it should have been. Should the employer have taken this code (Schedule 8) into account, this verdict would not have been breached. But also apart from that, in the view of this panellist and taking into account the provisions of the said schedule, the employee was simply not guilty of committing the charges preferred against him; ...’

Grounds for review

[6] The applicant seeks to review the commissioner's award on a number of grounds. The first is that in his award, the commissioner incorrectly referred to the applicant as GJ Human, when in fact he was EMShabangu. The second is that he recorded that the demotion took effect on 12 October 2007, when in fact it was demoted on 23 August 2007. The third ground is related to the commissioner's finding that Shabangu should not have been found guilty on account of the fact that he had never received any formal training in fingerprint comparison. The precise ground for review is best articulated by quoting from the founding affidavit, which reads as follows:

‘The second respondent erred by finding on face value that there was no formal training, that the third respondent was not in a position to execute his duties properly. In addition to the aforementioned, he also overemphasised the lack of formal training in the face of ample practical experience that the third respondent had, which practical experience was approximately 24 years.’

Analysis

- [7] There is no merit in the grounds for review that are placed in what the face of it appears to be no more than typographical errors. Certainly, the reference to 'GJ Human' (as opposed to ME Shabangu) in paragraph 5(a) of that part of the award headed 'Background to the issue' falls into this category, as does the objection relating to the date on which the demotion took place. In this regard, the pre-arbitration minute, on which the commissioner clearly relied, stipulated 12 October 2007 as the date on which he was demoted. These are not material issues, and certainly not an indication, as the applicant contends, that the commissioner failed to apply his mind to the evidence before him.
- [8] In regard to the commissioner's handling of the facts, and in particular the assertion that he afforded inadequate weight to Shabangu's 24 years' experience as a factor relevant to his culpability, it is not clear from the record whether Shabangu had occupied the same position (in which checks were conducted) for 24 years, or that he had prior experience in a position which required the analysis and comparison of fingerprints. The evidence on which the commissioner relied in coming to the conclusion appears to be that of a Mr Fouche, a fingerprint expert at the SAPS, who in a sworn statement referred to the proceedings stated in unequivocal terms that it is not possible to expect from any person to make a correct fingerprint comparison and to establish the correct identity of any person in circumstances where the comparing official was not trained and certified as competent in the comparison and identification of fingerprints. There is no evidence in the record that served to rebut this assertion, nor is there any evidence that Shabangu could be expected to perform his duties properly without training in fingerprinting analysis. In short, the factual conclusion to which the commissioner can sustain by the evidence before him. In my view, it cannot be said that the decision to which he came was one that falls outside of a band of decisions to which reasonable people could come on the available material. On this basis, and having regard to the threshold established by *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC), the application stands to be dismissed.

Costs

[9] The third respondent sought costs in the event that the application is dismissed. There is no reason why costs ought not to follow the result, and I intend to make an order on that basis.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge of the Labour court

Representation

For the Applicant: AdvFMMSnyman, instructed by the State Attorney

For the Respondent: Adv AM Pheto, instructed by Macbeth Hlongwane Attorneys