



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR1516/2009

In the matter between:

OCEAN BASKET AIRPORT

Applicant

and

BARGAINING COUNCIL FOR RASTUARANT

CATERING AND ALLIED TRADES

First Respondent

COMMISSIONER MOSALA MATLATLE

Second Respondent

SAACOWU obo PAUL MAKHULA

Third Respondent

Heard: 16 October 2012

Delivered: 02 November 2012

Summary: After dismissing the individual third respondent for dishonesty the applicant sought to reinstate him for purposes of holding an appeal hearing to cure procedural defects. He refused the reinstatement. The second respondent found the dismissal substantively fair but procedurally unfair and

order compensation. The finding falls within the range of reasonableness and not reviewable. Review application in terms of section 145 of the LRA.

JUDGMENT

LALLIE J

- [1] The applicant launched this application in terms of section 145 of the Labour Relations Act, 66 of 1995 (the LRA) to review and set aside an arbitration award in which the second respondent (the arbitrator) found the individual third respondent's dismissal procedurally unfair, but substantively fair. The third respondent opposed the application.

Factual background

- [2] The individual third respondent (Makhula) was one of the applicant's three managers. On the night preceding his dismissal the managers locked the takings of the day in a safe after cashing up. The following morning an amount of R2500.00 was missing from the safe. Makhula later confessed that he had removed the money. He explained that he had placed it in a part of the safe where it could not be seen by his colleagues to force one of them to talk to him in an effort to restore their working relationship. After statements were taken from the managers Makhula was dismissed. The third respondent trade union (SAACOWU) intervened and the applicant offered to reinstate him. He rejected the offer and challenged the fairness of his dismissal at the first respondent where he was granted compensation after his dismissal had been found procedurally unfair.

Grounds for review

- [3] The applicant sought to rely on one or more of the following grounds for review:

'3.1.1The Commissioner committed a gross irregularity when arriving at her conclusion in the Denova (sic) hearing to which the Third Respondent declined in writing (DC1)

3.1.2 The third respondent in paragraph 4 of their response clearly states that they did not wa

3.1.3 The Third Respondent was questioned on whether his Union discussed with him the risk

3.1.4 The Commissioner's ruling was not reasonable in relation to the evidence presented and procedural irregularity and that the Applicant's Union refused to attend the hearing. The Labour Court has been clear on the fact that the employer does have the right to correct its procedures and the refusal by an employee to attend the procedures would then not lead to an unfair dismissal.

The arbitration award

- [4] The arbitrator noted that it was common cause that both the substantive and procedural fairness of Makhula's dismissal was in dispute. She accepted the evidence of the applicant's chief operating (sic) officer, Mr. Locker (Locker) that he requested statements from all three managers that were on duty, including Makhula, and after reading them he took the decision to dismiss Makhula. She further considered the concession given by Locker under cross-examination that he did not issue Makhula with a notice to attend a disciplinary hearing. The arbitrator also accepted the evidence of Mr. Ngwenya (Ngwenya) who testified on behalf of the applicant that Makhula was not asked if he needed a representative or time to prepare for the hearing and concluded that Makhula's dismissal was procedurally unfair.
- [5] The arbitrator found that Makhula acted dishonestly by removing an amount of R2 500.00 from the take away box in the safe where money was kept after cashing up and placing it in the same safe where other employees with access to the safe could not see it. She concluded that Makhula's dismissal was substantively fair. She ordered the applicant to pay Makhula compensation in the amount of R27 500.00, which is equivalent to his five months' remuneration for the procedurally unfair dismissal.

The law

- [6] It is trite that the test for review of arbitration awards is whether the decision reached by the arbitrator is one which a reasonable decision-maker could not

reach.¹ The standard of reasonableness is applicable to both the conduct and outcome of arbitration.²

Evaluation

- [7] The applicant argued that the arbitration award stands to be reviewed and set aside on the grounds that Makhula's refusal to attend an appeal hearing to rectify the procedural defects of his dismissal disqualified him from receiving compensation for the procedural unfairness of his dismissal. It is common cause that after Makhula's dismissal SAACOWU addressed a letter to the applicant on 29 May 2008 proposing an urgent meeting to try and resolve the dispute amicably and in a convenient and effective manner. It was followed by the following letter:

'Your letter dated 11 June 2008 refers.

Please note that we have taken instructions from our member regarding the abovementioned case.

Our member can only appear provided he has new evidence to present in this case. Mr. ThopaneMakola does not have new evidence for a fair reason relating to his conduct and whether the procedure was fair or not.

The applicant seeks compensation should he succeed in his claim and does not see any reason for going back to work only for employer to rectify his procedural defects.

In cases where dismissal is not in dispute, the honours (sic) to prove that such dismissal is fair, lies with the employer.

We therefore request the bargaining Council to set the matter down for conciliation.'

- [8] The applicant also argued that the arbitration award had to be reviewed on the grounds that it is dialectically unreasonable as had the arbitrator attached due weight to the evidence of the offer of reinstatement, the arbitration award would have been different. The applicant sought to rely on a number of cases

¹*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 at para 110.

²*Gaga v Anglo Platinum Ltd and Others* [2012] 33 ILJ 329 (LAC).

including *Technikon SA v Mojela and Others*³ and *Kemp t/a Centralmed v Rawlins*⁴ in arguing that the arbitrator acted unreasonably by ordering the applicant to pay Makhula compensation for the procedural unfairness of his dismissal on the grounds that he unreasonably refused the offer of reinstatement for the purpose of an appeal hearing to be held to rectify the procedural defects.

- [9] The present matter is distinguishable from the decision in *Kemp t/a Centralmed (surpa)* in that in the latter matter the respondent rejected an offer of unconditional reinstatement for no valid reason. The following are some of the reasons given by the LAC for its decision at page 2691J to 2692D:

‘[30] In my view the following factors justify the conclusion that the respondent should have been denied compensation in this case.

- (a) a genuine and reasonable offer of reinstatement was made to her which she did not accept;
- (b) had the respondent accepted the appellant's offer of reinstatement –
 - i. she would not have suffered any financial loss which she may have suffered as a result of her dismissal;
 - ii. the dispute between the parties would have been resolved without the appellant having to incur the legal costs that he must be taken to have incurred in defending the unfair dismissal claim and the costs relating to this appeal;
 - iii. the respondent would not have incurred the legal costs that she must be taken to have incurred through this litigation both in the Labour Court and in this Court.
- (c) for some time after the appellant had made the offer of reinstatement to the respondent, the respondent did not even bother to respond to the appellant – and that is conduct which is unacceptable, particularly when one of the parties is trying to have the dispute resolved. Such conduct undermines one of the primary objects of the Act which is the effective (which includes

³(2003) 24 ILJ 1737 (LC).

⁴(2009) 30 ILJ 2677 (LAC).

expeditious) resolution of disputes: it is better that disputes be resolved through conciliation than through litigation or arbitration or industrial action.'

[10] Also the *Technikon SA* case (*supra*) can be distinguished from the present matter in that, in the former, the respondent refused an unconditional offer of reinstatement and offered no reasonable explanation for the refusal. The refusal appeared to be based on an interest in financial settlement only.

[11] I am not convinced that the applicant's reinstatement offer was genuine and reasonable. It cannot be said in the present matter that had Makhula accepted the offer of reinstatement he would not have suffered financial loss which he suffered as a result of the dismissal, because the purpose of offering him reinstatement was to cure the procedural defects of his dismissal. Had Makhula accepted the reinstatement offer, the applicant would have cured the procedural defects of his dismissal and he would have been dismissed again in a procedurally fair manner and he would have continued to suffer the financial loss which comes with dismissal. A possibility existed that the dispute between the parties would remain unresolved and they would have gone through the same dispute resolution process which they have gone through now that the third respondent has rejected reinstatement. In the circumstances, I find that the arbitration award falls within the range of reasonableness and there are therefore no grounds to review it.

Order

[12] In the premises, the following order is made:

[12.1] The application for review is dismissed;

[12.2] There is no order as to costs.

Lallie J

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:

Ms. Dippenaar

of Du Rand Du ToitPelser Attorneys

FOR THE RESPONDENTS:

MC Netshisumbewa

of SAACOWU