



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, AT DURBAN

JUDGMENT

Not Reportable

Case no: D934/09

In the matter between:-

JOYCE SIMUNYOLA

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

S. MCGLADDERY

Second Respondent

DEPARTMENT OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

Third Respondent

Heard : 30 August 2012

Delivered : 5 April 2013.

Summary : Review of award – onus not shifted where applicant's evidence was analysed before that of respondent bearing such onus. Approach of commissioner to evidence in dismissal disputes.

JUDGMENT

CELE J

Introduction

[1] In terms of s 158(1)(g) of the Act,¹ the applicant seeks a review of the award of the second respondent, who sat as an arbitrator in an alleged unfair

¹The Labour Relations Act 66 of 1995.

dismissal dispute brought by the applicant, under the auspices of the first respondent. The award in question is dated 9 October 2009. The third respondent (hereafter also referred to as the Department) opposed the review application in its capacity as the erstwhile employer of the applicant and in whose favour the assailed award was issued.

Factual background.

- [2] The applicant commenced her employment with the Department in November 2002 and in 2007 she was based in the Pietermaritzburg Magistrate's Office as an Administration Officer. Her duties included dealing with human relations matters, such as the short listing and interviewing of personnel for the third respondent and making recommendations for the appointment of a suitable candidate or candidates. She worked under Mr Mark Naicker who held the position of an Area Court Manager to which he was appointed after the applicant had been a contesting candidate. The applicant believed she was the most favoured candidate for that appointment.

- [3] Sometime around June 2005, the applicant had been the Chairperson of the Selection Committee which shortlisted and interviewed candidates. One of the candidates, a Mr S.R.O. Hlongwane, was the applicant's biological son. The applicant did not disclose the fact that she was Mr Hlongwane's mother either to her employer or to any of the other panelists. The applicant suggested to one of the panelists, Mr Nkosinathi Mangaliso that she would draw up all questions to be used in the interview and indeed she provided such questions. All other panel members did not take issue with the source of the questions to be used and a number of those questions were used in the interview in question. Her son was finally recommended for the appointment, to the exclusion of all other candidates.

- [4] There was another occasion either on 4 or 6 July 2005, when the applicant returned to the Pietermaritzburg office during the day, after performing her duties elsewhere. She went into an open plan type of office where there were a number of clerks and acting clerks supposedly working. Gospel music by a

group known as Joyous Celebration was either played from office computers or compact discs of the group were handled by the clerks.

- [5] From these two incidents, the third respondent charged the applicant with 6 acts of misconduct. For the first incident relating to her son, she was, in the main, charged for fraud, on the basis of her failure to disclose that one of the candidates to be interviewed was her son, and there were various alternative charges relating to showing favourism towards her son, acting in abuse of her authority and giving questions for the interview to her son, or priming him, to afford him an advantage in the interview. In respect of the second incident, she was charged with intimidation of a colleague who was to testify at her disciplinary hearing. There were then 4 similar charges of corruption, in that, she allegedly offered to accept gratification from the clerks who were to freely supply her with gospel music compact discs, failing which they might not get permanent appointments into the Department. On count one she was found guilty of the main count and was found guilty on the second and the other four counts of corruption. The chairperson of the internal disciplinary hearing, Mr Viyani Kenneth Mqaqula recommended that she be dismissed and the Department dismissed her. She referred an unfair dismissal dispute for conciliation and later for arbitration. The second respondent was appointed to arbitrate the dispute. At arbitration the second count and one count of corruption were not pursued by the third respondent.

Chief findings of the second respondent

- [6] By and large, the facts on the first charge were common cause between the parties. The second respondent was called upon to determine whether the admitted facts constituted fraud. He found that:
1. notwithstanding whatever might be included in a disciplinary code or policy, or even excluded for that matter, it was trite that employees had a common law duty to act diligently and to protect the interests and the property of their employers. Workplace rules of employers had different sources. Some flow from common law, some are specifically and expressly provided for in

disciplinary codes and there were rules or standards that might arise impliedly from the conduct of the parties;

2. no recruitment policy was produced at arbitration and there was a lack of certainty that the third respondent had one, as was the case in other departments, with specific reference to a need for a recusal or to have to withdraw from a process if a panel member had a strong tie with a candidate;
3. it was conventional wisdom that it was undesirable to have a selection committee with a panelist who had strong ties to one of the candidates. The applicant was the Head of Human Resources in her work place, having the responsibility to carry out functions such as convene and head selection panels. She ought to have known the need for a recusal better than anyone else;
4. she had been involved in a number of selection committees and was consequently experienced enough to know that her duty in the selection process was that of being impartial and unbiased. It was improbable that anyone interviewing his or her own child would remain completely disaffected by the relationship;
5. with the end in mind, of objectively and fairly selecting the best candidate, and with the code of conduct at the back of her mind, she was required to act ethically. While she was correct in contending a need for a set of rules and legal obligations to be in place to obviate any contentions and ambiguity, she could not claim to be ignorant of what was required of her in terms of conduct and behavior as a senior manager in her office;
6. an employer was not confined to acting against employees for a breach of rules expressly set down in a disciplinary code. Taking action against an employee was justified when that employee should reasonably have known that his conduct was wrong;
7. in the circumstances, the third respondent had proved that there existed rules and expected standards of conduct and these were known to the applicant;

8. it was common cause that the applicant was the Chairperson of the selection committee involving both the short listing and interview processes. One of the candidates was her biological son, MrHlongwane. The applicant did not disclose that fact to the other panelists. In this regard, the applicant had a legal duty to disclose that one of the candidates was her son and to recuse herself from the process, or at least, to leave it to the panelists to decide the issue and such non-disclosure was material. By her omission she committed a culpable misrepresentation. The prejudice to the third respondent was that the whole process was compromised, leaving the third respondent vulnerable to unfair labour practice disputes by other candidates. The applicant therefore acted unlawfully;
9. by failing to disclose the fact, which was considered to be material in the circumstances, the applicant misrepresented that there was in reality no cause for concern in her sitting as the Chairperson and that there was no need for her to either disclose, or to recuse herself from the interview process;
10. she was guilty of the acts of misconduct charged on that count.

Grounds for review

[7] Various grounds of review, which are inter-related, have been outlined by the applicant. Essentially in this application, it is contended, inter alia, that the second respondent committed a defect as defined in s 145 of the Act in that:

- 7.1 when analyzing the evidence presented before him during the arbitration, he was expected to start with the evidence presented by, and/or on behalf of, the third respondent. This was essential as it had to do with the consideration and/or the identification of the party who bore the onus to prove. However, for some reasons unknown to the applicant, the second respondent began with the evidence of the applicant when he made his analysis. There was a misconception on his part which influenced the award he made and that same misconception amounted to misconduct in relation to his duties as an arbitrator;

- 7.2 his non-comment or disregard of the evidence pertaining to the evidence given by the applicant, that Mr Naicker championed her dismissal as he regarded her as a threat to his position, constituted a misconduct in relation to his duties as an arbitrator;
- 7.3 when he misconstrued and disregarded the significance of the applicant's evidence pertaining to Ms Mnguni's involvement in the appointment of her sister, the second respondent committed a misconduct in relation to his duties as the arbitrator;
- 7.4 he committed a misconduct in relation to his duties as an arbitrator when he found that the Department had discharged the onus pertaining to the existence and breach of the rule or policy requiring a member of the selection committee to disclose any relationship they might have with the candidate. His finding in that regard was contrary to his analysis of the evidence and/or the material placed before him in connection with this issue. As such, it is not justifiable or reasonable;
- 7.5 he made an error of law amounting to a gross mistake in relation to his duties as an arbitrator when he merely accepted that the chairperson of the disciplinary hearing had done the necessary when he placed the Department's inconsistencies on record and had it brought to the attention of the authorities. The Department did not dispute the applicant's evidence to the effect that Mr Naicker was aware of the said inconsistencies. Hence, it was not necessary for Mr Mqaqula to alert the Department about it. The second respondent made an error of law amounting to a gross mistake when he failed to apply a parity principle on the basis that if the Department did not follow up on Mr Mqaqula's initiative, there would be no fault on the latter. It was submitted that the Department and Mr Mqaqula were, for the purposes of the disciplinary enquiry, one and the same and that the distinction that the second respondent tried to create between the two, was both unnecessary and unjustified. Further, that it was intended to cloud the issue pertaining to whether or not there was any inconsistency on the part of the Department in that regard. It was submitted that the second respondent's reasoning in that regard showed that he also

misconceived the whole nature of the enquiry or of his duties in connection therewith;

- 7.6 he made an error of law amounting to a gross mistake when he inferred that for inconsistency to exist there should be a trend in this regard;
- 7.7 he made an error of fact when he found that the applicant was the Head of Human Resources at the workplace. The applicant gave clear evidence that she was employed as an Administration Officer and nothing was produced by the Department to discredit that evidence. As a result of the said mistake, the second respondent made a wrong decision.

Grounds in opposition to the review

[8] In opposing this application, the third respondent submitted that the applicant had not shown that the award is reviewable and without traversing all grounds of review, it submitted inter alia that:

- 8.1 there is no rule that prescribes how an arbitrator should begin his/her arbitration award. By commencing with the evidence of the third respondent, the second respondent could not be held to have shifted the onus. In fact the second respondent correctly commenced with the evidence of the third respondent and the very point made by the applicant's legal representation appeared to contain an internal contradiction;
- 8.2 the applicant complains that the second respondent arrived at a finding that was contrary to his analysis of the evidence and/or the material placed before him, but she has not taken the Court into her confidence by demonstrating where in the papers such misconduct could be found;
- 8.3 the submissions made in support of the error of law do not make sense. It is not an error of law nor is it a gross mistake for an arbitrator to accept the evidence of one witness in relation to general and vague allegations of inconsistency. Mr Naicker testified that he was not aware

of the regular exchange of gifts at Christmas time and testified that as far as he was concerned, a senior employee was not entitled to accept a gift from a junior employee.

- 8.4 the applicant contended in the arbitration that the third respondent had acted inconsistently in the sanctions that it had imposed against its employees. She argued that the Presiding Officer at the internal enquiry should have had regard to sanctions imposed by the third respondent on others, and drawing therefrom, should have imposed a different sanction, partly or wholly, to correct the alleged inconsistency on the part of the third respondent. The issues involved in this case have nothing to do with the parity principle. The second respondent correctly found that in terms of the parity principle, the third respondent was required to treat like cases alike. He also correctly found that in doing so, the third respondent was not obliged to impose the same penalty which had been imposed upon the applicant, on others. The third respondent correctly analyzed the law relating to the consistency in disciplinary actions. He correctly held that consistency is an element of disciplinary fairness.

Evidence in brief

- [9] On the first count, the issue for a decision by the second respondent turned on whether there existed a rule which the applicant might have breached. The applicant contended that there was no rule which she breached, as other colleagues had acted in a similar manner as herself on previous occasions to the knowledge of the third respondent with impunity. She referred to two instances firstly where Ms Zodwa Mnguni failed to disclose at the time, that she was related to her sister who was a candidate for appointment. When the applicant came to know of the relationship, she asked Ms Mnguni about it, only to be told that Mr Naicker had told her to appoint someone she was familiar with and would be happy to work with. Secondly, Mr Anesh Lalbahadur did not disclose that he was related to a candidate, Mr A Ramdeen, his nephew. The applicant had also sat in on the interview of Mr

Ramdeen and her son was also interviewed for the same post but was not appointed. She had disclosed her relationship to her son and permission was granted for her to sit in. She added that in any event, the sanction imposed on her was too harsh in the circumstances. It was against that background that the evidence had to be seen.

[10] Mr Nkosinathi Mangaliso testified for the third respondent and said that he took part in the short listing and interview of candidates, including applicant's son, in or around June 2005. The panelists elected the applicant to be the chairperson on the basis of her experience in human resources. As a group leader, she would be able to tell the panelists what the correct procedure would be to follow. He volunteered to supply the questions to be used but the applicant interjected by saying, albeit jocularly, that she would prepare the questions as he might know someone or some candidates, as he was based at Eshowe at the time. He went along with the suggestion of the applicant and she came up with the questions they used for the interview. All candidates had taken some time to answer questions except Mr Hlongwane who answered as if he were reading from a book, making it even difficult for more questions to be put as his responses kept flowing. Once the interview was over, the applicant asked who the best candidate was. He stated that it was an Indian Female who had shown great experience and had answered questions well. The applicant said that Mr Naicker would not agree to employ an Indian. The panelists then agreed that Mr Hlongwane was the best candidate. Mr Hlongwane was duly appointed and worked with Mr Mangaliso at Eshowe. The applicant would occasionally call him to find out how was doing but Mr Mangaliso did not think anything of it as he did not know that Mr Hlongwane was her son until the matter was investigated into.

[11] Mr Naicker testified that the applicant was in charge of human resources and as such chaired and convened the selection panels. In his evidence, various codes were referred to as being applicable in the Department, dealing with and regulating misconducts. He conceded that relations between him and the applicant at some stage in 2005 took a turn for the worse, in that a report was given to him by Ms Mathe, of what was allegedly said by the applicant about him in the office, as a result of which he collected affidavits from the clerks on

the matter for onward submission to the Senior Court Manager. He denied being aware that Ms Mathe and the applicant were at odds with each other. He denied that it was the combination of him and Ms Mathe, as adversaries of the applicant, which led to her being charged for this matter. He was aware that the applicant had lodged a grievance pertaining to the post against which he had been appointed. He denied being aware of a grievance lodged by the applicant against him relating to the manner in which she was treated by him.

[12] The applicant testified that she had had good relations with Mr Naicker until she heard, before their job interview for the post subsequently held by him, that he was collecting statements from the clerks to make some case against her. A meeting was also held in Mr Naicker's office where she was discussed. She then lodged a grievance against him. After their job interview, information leaked out to her that she had done very well. When she was not appointed, she then lodged a grievance of an unfair labour practice relating to promotion.

[13] In her office establishment, worked Ms Mathe. When applicant could not meet Ms Mathe's requests about the transfer of her husband-to-be and about the purchase of her wedding ring, relations between her and Ms Mathe were strained. Ms Mathe and Mr Naicker then jointly orchestrated these charges against her, well knowing that other colleagues had sat in on interviews of their relatives without disclosing their ties and no action was taken against them. She said that she had reported Mr Lalbadur's relationship with an interview candidate to Mr Naicker but he did nothing about it. Page 376 of the paginated transcript of the arbitration proceedings has a record of what she said in the disciplinary hearing concerning the appointment of Mr Lalbahadur's nephew and was quoted to read:

'Did you report the fact that he appointed his nephew to anybody of his senior or at the magistrate's court here?

No I could not have reported this. I wouldn't have done that because everybody's related there. There are also even sisters working at the same department in the same office.'

[14] According to her, Mr Naicker was not truthful in denying knowledge of the two grievances she had lodged against him, as there was a letter from Mr Denise Hartse as confirmation of the receipt of the grievances and Mr Naicker signed

for those grievances. As already pointed out, she denied the existence of a rule in favour of a recusal and referred to the two cases discussed earlier. In terms of sanction, she felt she was treated differently from other staff. As a chairperson of the disciplinary hearing, Mr Mqaqula had been told to find her guilty and to dismiss her. He was therefore biased against her. As a result, Mr Mqaqula failed to act on the report she had made to him during the internal disciplinary hearing of the failures of other staff to recuse themselves where their relatives appeared before them as candidates for interview. His failure to act should be ascribed to the third respondent.

- [15] In my view, the charges relating to corruption and giving of presents were of a minor nature and could not alone find a basis for dismissal. In their closing submissions, the parties correctly said very little of these charges as this matter should be disposed of on the basis of the first charge. No further reference will therefore be made to those charges.

Evaluation

- [16] As to how a commissioner should approach dismissal disputes, the Court held in *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*², that:-

'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'³

- [17] The second respondent issued an award without numbering the paragraphs (which would have made reference to them easy). For ease of reference, I will accordingly make use of the typed page numbers at the bottom of the page of

² 2008 (2) SA 24 (CC).

³ Above page 52E-G.

the award and not to the paginated numbers of the bundles. The question is whether the second respondent, in approaching the evidence, wrongly placed the onus of proof on the applicant by beginning the analysis with her evidence, instead of firstly analysing the evidence of the third respondent.

- [18] Page 35 of the award contains the subtopic marked as “Analysis of evidence and argument”. From page 35 to the middle of page 38, the award then has some introductory remarks which are followed by an identification of the issues, as raised by the applicant, for consideration and item 7 of the Code of Good Conduct helped to identify the issue. In the first three paragraphs on page 38, the second respondent outlined the version of the applicant. From page 38 to the middle of page 42, the second respondent then deals with evidence of the respondent through which it had to discharge the onus resting on it. The applicant is therefore correct in saying that the second respondent commenced the approach to the evidence by analysing her evidence. A contextual reading of the award clearly shows that the second respondent was alive to where the onus rested. This is borne out, inter alia, by the positive finding he made in favour of the applicant in the third paragraph on page 38 and his opening remarks on page 40. I am accordingly not persuaded by the applicant, that she was burdened with an onus that was never hers. In a neat picking style, the applicant was really being opportunistic. No defect visited the award in this regard and this ground must accordingly fail.
- [19] The next grounds relate to Mr Naicker having championed her dismissal as he regarded her as a threat to his position and Ms Mnguni’s involvement in the appointment of her sister and the failure of the second respondent to deal with these issues and their significance. Once it was found that a valid and reasonable rule or standard existed which the employee was aware of, or could reasonably be expected to have been aware of, and that it had consistently been applied, the motive for which other employees reported the infringement of the rule becomes less important. The central focus should then be about whether the rule was infringed or not. Simply put, the elements of a charge of misconduct are the relevant considerations at the hearing, over the motive on why the infringement was reported. The case of the applicant

was that her two adversaries, Ms Mnguni and Mr Naicker, fabricated charges against her. If the evidence on the charges could not stick, it could be inferred that the charges were fabricated. The success or failure of these grounds of review is accordingly dependent on the next ground.

[20] The next consideration is whether the second respondent committed any misconduct in relation to his duties as an arbitrator when he found that the Department had discharged the onus pertaining to the existence and breach of the rule or policy requiring a member of the selection committee to disclose any relationship they might have with a candidate. It was further contended that his finding in that regard was contrary to his analysis of the evidence and/or the material placed before him, in connection with this issue, and, as such, it is not justifiable or reasonable. As to the existence of the rule, the second respondent extensively dealt with this from page 37 to 42 of the award. The applicant has not demonstrated how the second respondent misconducted himself in the light of evidence tendered and analysed, on how the applicable legal principles were applied and on how the second respondent reasoned his way through until he reached a conclusion. In my view, the second respondent acquitted himself very well in this regard, thus making it difficult for the applicant to hold on to any particular defect and merely generalising for lack of particulars. The reliance by the second respondent on the case of *Verwy v Volkswagen of SA (Pty) Ltd*⁴ cannot be faulted, when he found that an employer was not confined to acting against employees for a breach of rules expressly set down in a disciplinary code. Taking action against an employee was justified when that employee should reasonably have known that his conduct was wrong. Accordingly, grounds two, three and four are dismissed.

[21] The second respondent accepted that the chairperson of the disciplinary hearing had done the necessary when he placed the Department's inconsistencies on record and had it brought to the attention of the authorities. The submissions of the applicant suggest that a chairperson of an internal disciplinary hearing has more powers than a consideration of the misconduct with which an employee before him or her has been charged. The applicant's

⁴[1996] 9 BLLR 1198 (IC).

evidence, to the effect that MrNaicker was aware of the said inconsistencies, was challenged at the arbitration and her contradictory evidence at the disciplinary hearing was shown to cast doubt on the veracity of her version. The second respondent even found that she was an untruthful witness. The second respondent cannot be faulted for regarding the allegations against Mr Naicker and Ms Mnguni as new issues that the third respondent had not been enabled to deal with. These allegations could therefore not serve as a basis for the application of the parity principle. The applicant was extensively challenged under cross examination on whether the third respondent was informed of the other breaches of the rule by other employees. She went on an errand and said that it was well known that some staff worked with their sisters, without demonstrating how a breach of the rule was committed. Working with one's sister is by that fact alone not a breach of any rule. More needed to be said in that regard. No error of law amounting to a gross mistake in relation to his duties as an arbitrator has therefore been shown to have been committed by the second respondent.

[22] The final probe turns on whether the second respondent made an error of law amounting to a gross mistake when he inferred that for inconsistency to exist there should be a trend in this regard and whether he made an error of fact when he found that the applicant was the Head of Human Resources at the workplace. Inconsistency, inter alia, refers to a discrepancy, contradiction, variation or irregularity. It therefore involves a comparison of at least two states, which can be the present state compared with the past. To this extent, reference to some trend is accordingly not a misnomer.

[23] In respect of the finding that the applicant was the Head of Human Resources at her work place, it remained common cause that she dealt with human resource matters at her work place and even colleagues who were senior to her within her cluster, such as Messrs Naicker and Mangaliso respected her opinion on human resources matters. The fact that she was not paid as a human resources officer, as she moaned about, did not detract from the fact that, at her work place (or cluster), she was regarded as the most senior. No evidence to the contrary was led by her. Accordingly, the findings of the second respondent in this regard cannot be assailed. These grounds must

similarly fail. I do not consider it necessary to deal with any other grounds outlined by the applicant, for lack of merits in them. Accordingly the following order shall issue:

1. The review application is dismissed;
2. No costs order is made.

Cele, J

Judge of the Labour Court

Appearances:

For the applicant: Adv Z. Luthuli.

Instructed by AP Shangase & Associates, Durban.

For the third respondent: Adv. L. Naidoo.

Instructed by the State Attorney, Durban.

LABOUR COURT