



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JR 65/12

In the matter between:

PHILLIP MAGAGULA

APPLICANT

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

FIRST RESPONDENT

NKOSINATHI MASEKO N.O

SECOND RESPONDENT

EMALAHLENI LOCAL MUNICIPALITY

THIRD RESPONDENT

HEARD: 15 MAY 2013

DELIVERED: 7 FEBRUARY 2014

Summary: The arbitrator's failure to give clear reasons for finding a dismissal substantively unfair and to deal with the applicant's defence of inconsistency renders an arbitration award reviewable.

Review in terms of section 145 of the LRA- Dismissal for misconduct.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an award issued by the second respondent ('the arbitrator') in favour of the third respondent (the

Municipality). It is opposed by the Municipality. This application was filed outside the six weeks period envisaged in section 145 of the Labour Relations Act 66 of 1995 (the LRA) and the applicant sought condonation of the lateness. The Municipality decided not to pursue its opposition of the condonation application. The Municipality filed an application for condonation of the late filing of its answering affidavit and the applicant adopted a similar approach. I am satisfied that the Municipality has shown good cause for condonation of the lateness.

- [2] In his condonation application, the applicant has given a reasonable explanation for the delay. He has expressed the importance of this case to him. He has prospects of success and he stands to suffer more prejudice than the third respondent should condonation be refused. I am satisfied that he has shown good cause as required in section 145 (1A) of the LRA.

Factual Background

- [3] The applicant entered the employ of the Municipality as an electrician in 1997 and left it when he was dismissed on 31 December 2010 holding the position of an Engineering Technician. Pursuant to a forensic audit report, the Municipality received in February 2010, it established a committee with authority to take disciplinary action against employees implicated in the report. The applicant was amongst the implicated employees. He was suspended from duty and 7 charges of misconduct were levelled against him. At the disciplinary enquiry which ensued he was found guilty of charge 1 for which he was given a final written warning and charges 2, 6 and 7 for which he was dismissed. Charges 3, 4 and 5 were withdrawn.

- [4] The applicant was found guilty of the following charges:

Charge 1

‘You are guilty in that you have failed to declare our interests in the following businesses: Eubo Cleaning and Projects CC; Eavesdrop Trading 42 CC’.

Charge 2

'You have failed to disclose, as required by the Local Municipal Systems Act to the Municipality that the following companies stood to benefit from contracts concluded with the Municipality when you ought to have known that these companies belong to your close family and relatives, and these companies are:

Mtombeni Trading Enterprise;

Thejo Cleaning and Projects;

Zitho'bse Construction and Projects;

Zanel Intombi Business Enterprise;

Logwaza Construction;

Shona Projects; and

Dzengwe Trading Enterprises'

Charge 6

'You acted in contravention of the Act in that you, in your capacity as an employee of the Municipality, used your position to improperly benefit your close family members and/or relatives when you knew or ought to have known that the above companies belonged to your close family members and or relatives'

Charges 7

'Your personal involvement in the transactions between the Municipality and the companies owned by your close family members and/or relatives constitutes a conflict of interest'.

- [5] Convinced that his dismissal was unfair, the applicant referred a dispute to the first respondent (the bargaining council). When the matter was set down for arbitration, the applicant and the Municipality decided not to lead oral evidence but to rely on the pre-arbitration minute and the record of the disciplinary enquiry. They also agreed to submit heads of

argument. In addition, they filed, at the request of the arbitrator, further heads of argument on historical and contemporaneous inconsistency. In an award dated 30 June 2011 but received by the applicant on 26 September 2011, the arbitrator found the applicant's dismissal both procedurally and substantially unfair and refused to interfere with the sanction issued at the disciplinary enquiry. It is that award the applicant seeks this Court to review and set aside.

Grounds for review

- [6] The applicant seeks an order reviewing and setting aside the entire arbitration award and the conclusion reached by the arbitrator on the basis that he reached a decision no reasonable decision-maker could have made on the matter. He sought to rely on a number of grounds. The test for review is settled. It is enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. It is whether the arbitrator reached a decision a reasonable decision-maker could not reach.
- [7] The applicant submitted that the arbitrator committed a gross irregularity and misunderstood the issues he was required to decide because of the manner in which he identified the issue in dispute. The arbitrator recorded that he was called upon to make a determination on whether the respondent had been inconsistent in applying discipline to its employees instead of stating that he was required to determine whether the applicant's dismissal was substantively and procedurally fair. This error, according to the applicant constitutes sufficient reason for finding the award reviewable. The third respondent argued that the above ground is devoid of merit. It sought to rely on some portions of the award. The first is that the arbitrator recorded that should he find that the Municipality had been inconsistent he should proceed to determine the fairness of the dismissal. The second is that the arbitrator summarized the applicant's submissions as challenging both the procedure and the reason for the termination of his employment. The last is the following:

¹ [2007] 12 BLLR 1097 (CC)

‘I am called upon to determine whether the applicant was guilty as charged, alternatively, it would seem, I must decide on the reputed inconsistent application of discipline. Lastly, according to submission made by the disputants, I must determine whether the dismissal was effected in accordance with a fair procedure as contemplated by Section 188 (2) of the Act’

- [8] The issue before the arbitrator was whether the applicant’s dismissal was substantively and procedurally fair. I am not convinced that reading the portion of the award where the arbitrator recorded the issue in dispute is sufficient to base the decision that he committed an irregularity by not recording the issue in dispute properly. One of the purposes of stating the issue in dispute is to indicate that the arbitrator understood the nature of the dispute he or she had to arbitrate. Reading the part of the award where the issue in dispute is recorded only is a narrow approach of making the determination. A proper decision that the arbitrator did not have a full understanding of the issue in dispute can be made after the whole award has been considered. A reading of the award reflects that in different parts of the award the arbitrator recorded and referred to the issue in dispute differently. However, when he was analysing evidence he stated that he would confine himself to whether the dismissal of the applicant was for a fair reason and whether same was effected in accordance with a fair procedure. Should he find that the applicant had committed the infractions he was accused of, he was required to determine whether the respondent had been consistent in applying discipline. A reading of the entire award therefore proves that the arbitrator may have recorded the issue in dispute incorrectly under the relevant sub-heading. When analysing evidence he proved clearly that he understood the issue in dispute clearly. The issues tabulated by the applicant and the Municipality as issues that the Council was required to decide, collectively deal with substantive and procedural fairness of the applicant’s dismissal. The first ground for review is therefore invalid.

- [9] The applicant sought to rely on the arbitrator’s error to the effect that there was no full citation of *Denel v Vorster and Highveld District Council*

v CCMA, authority the applicant relied on at arbitration. The applicant had provided the full citation. The applicant submitted that the error evinced the arbitrator's failure to read his heads of argument or that he did not have them at his disposal when he was writing the award as he would not have made the error had he perused the heads of argument. The submission is farfetched. There are a number of reasonable inferences which can be drawn from the arbitrator's error other than his failure to read the heads of argument in which the case was referred to. Had the arbitrator not read the heads of argument he would not have been aware that the applicant had made reference to the case. This ground does not hold water.

- [10] The applicant based his further attack on the award on the arbitrator's omission to record all the submissions made on his behalf. Section 138 of the Labour Relation Act 66 of 1995(LRA) requires arbitrators to give brief reasons for their decisions. There is no duty on them to record all the submission made by the parties. His omission can therefore not be faulted.
- [11] Contrary to the applicant's submission, the arbitrator applied his mind to the issue of procedural fairness. This is supported by the reasons he furnished for finding that the procedural defects did not render the dismissal procedurally unfair. The arbitrator recorded the submissions on behalf of both parties and analysed the evidence before him. He, as the applicant correctly submitted, did not give reasons for his finding that the applicant's dismissal was substantively fair. The arbitrator's main duty is to determine the dispute before him or her and give brief reason for his or her decision as envisaged in section 138 (7) of the LRA. His omission to give reasons for finding the applicant's dismissal substantively fair was unreasonable.
- [12] The applicant submitted that the arbitrator's failure to deal with the question of consistency rendered the award reviewable. The source of the inconsistency is the submission by the applicant that Mr SJ Mathebula's case had been dismissed because of the Municipality's

failure to comply with clause 6.5.7, 6.5.8 and 6.5.9 of the disciplinary code. His case should have been dismissed for the same reason. The applicant also submitted at the arbitration that other employees who were implicated in the forensic audit report had their cases dismissed for non-compliance with provisions of the disciplinary code.

- [13] Opposing the above ground, the Municipality submitted that the arbitrator's finding was correct in that failure to comply with a disciplinary code did not render dismissal procedurally unfair. He argued that his conclusion was consistent with a number of cases including *Leonard Dingler (Pty) Ltd v Ngwenya*² and *Denel (Pty) Ltd v Voster*³, *Highveld District Council v CCMA and Others*⁴.
- [14] The arbitrator stated that the applicant was not contending that the enquiry was not fairly conducted. He instead contended that the enquiry was not properly constituted and consequently the dismissal became both procedurally and substantively unfair. The arbitrator made a finding that non-compliance with the disciplinary code did not necessarily render the dismissal procedurally unfair. He dealt with only a portion of the issue the applicant raised based on the disciplinary code. He failed to deal with the question of consistency. It was the applicant's case at the arbitration that the third respondent acted inconsistently by not dismissing his case for its failure to comply with the disciplinary code as it did to other implicated employees.
- [15] It is not in dispute that the applicant raised the issue of inconsistency at the disciplinary enquiry. Even the arbitrator, in stating the issue in dispute recorded that he was required to make a determination on whether the Municipality had been consistent in applying discipline to its employees. He failed to make the determination having asked the applicant and the Municipality to submit heads of argument on inconsistency. The importance of the principle of inconsistency is borne out by the facts of

² [1999] 5 BLLR 431 (LAC).

³ 2004(4) SA 481 (SCA).

⁴ [2002] 12 BLLR 1158 (LAC).

this case. It sometimes determines whether all the employees who committed the same or similar misconduct lose their jobs through dismissal or retain them. The danger of overlooking the principle of inconsistency is that it opens employees to unfair discrimination by creating an opportunity for an employer to dismiss only some and not all the employees who have made themselves guilty of the same or similar misconduct, taking into account that each case is determined on its merits. The constitution precludes unfair discrimination at workplace.

[16] The arbitrator's omission to deal with the issue of inconsistency constituted a gross irregularity. When the award is considered in its totality it shows that the irregularities committed by the arbitrator led him to reach a conclusion which a reasonable decision-maker could not have reached on the evidence before him.

[17] I could find no reason for costs not to follow the result.

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

18.1 The application for condonation of the late filing of the review application is granted.

18.2 The application for condonation for the late filing of the answering affidavit is granted.

18.3 The arbitration award issued by the second respondent under case number MPD 011101 and dated 12 May 2012 is reviewed and set aside.

18.4 The matter is remitted to the first respondent to be arbitrated *de novo* by an arbitrator other than the second respondent.

18.5 The third respondent is ordered to pay the applicant's costs.

Lallie, J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

For the Applicant: Mr Mosebo of Maserumule Inc

For the Third Respondent: Advocate Motyolo

Instructed by: Werkmans Attorneys

LABOUR COURT