



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 235 /12

In the matter between:

BIDVEST STEINER (PTY) LTD

Applicant

and

NKGOENG, W N.O.

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

SIHAUKELE NXONGO

Third Respondent

Heard: 15 January 2014

Delivered: 27 February 2014

JUDGMENT

HAFEGEE AJ

Introduction

- [1] This is an application to review and set aside an arbitration award made by the first respondent (“the Commissioner”) dated 27 December 2011 in which the dismissal of the third respondent (“the employee”) was found

to be substantively unfair. The Commissioner awarded the employee compensation equivalent to four month's remuneration being R127 800.

[2] The applicant ("the company") employed the employee as a General Manager since 18 October 2007 until his dismissal on 19 October 2011.

[3] The employee was charged with misconduct because, the company alleged, he had not complied with lawful and reasonable instructions and had company policies and procedures not to employ a direct and/or indirect family member.

[4] The company's ethics policy contains a clause that reads as follows:

'The company due to the nature of its businesses has adopted the following relationship policy:

a) the company will not employ any direct or indirect family member of any employee, unless agreed to by the managing director.

[5] The employee had acknowledged receipt and acceptance of the company's ethics policy. Additionally, the company had specifically informed its employees in the past about the importance of not employing family members by way of a memo, at a conference and at a meeting.

[6] During February 2011, the employee employed Mr R du Plessis who is married to the sister of the employee's girlfriend. The company alleges that this amounts to an indirect family relationship because Mr du Plessis is akin to being the employee's sister-in-law. The employee contends that this did not amount to a direct or indirect family relationship.

Arbitration award

[7] The Commissioner identified the issue in dispute to be whether Mr du Plessis was an indirect family member of the employee. The company policy does not define an indirect family member. Accordingly, the Commissioner concluded that in the absence of any definition the

meaning of “indirect family member” should be ascribed its ordinary meaning and that any other meaning would amount to unilateral amendments and/or a change of the company policy.

- [8] The Commissioner found that the relationship between the applicant and his girlfriend did not amount to be a family relationship. He concludes that on the balance of probabilities the company had failed to discharge the onus to prove that the applicant was guilty of the charges of misconduct and that the dismissal of the employee was substantively unfair.
- [9] He did not award re-employment or reinstatement of the employee because the employee did not wish this. Accordingly, he awarded compensation that he considered just and equitable.

Grounds of review

- [10] In its founding affidavit, the company cites numerous broad and generalised grounds of review without substantiation.
- [11] In its heads of argument and that the hearing of the matter, the main ground of review appears to be that the Commissioner had ignored the purpose of the policy: namely, to ensure objectivity and to preserve the [company's] culture of integrity and honesty.
- [12] The Commissioner is also alleged to have ignored the evidence that the reason for the policy was to prevent any conflict between employees, inconsistency in decision-making, favouritism and nepotism. Further, the Commissioner is alleged to have ignored the evidence that the employee had previously been remanded for having a personal relationship with a fellow employee and that the employee therefore knew that the appointment of a family member of his girlfriend was wrong.

Evaluation

- [13] The company has extensively set out the test for review as established by the Constitutional Court and subsequently further developed by the Labour Appeal Court. The company emphasised that an award is reviewable if a Commissioner failed to apply his mind to materially relevant facts or considerations so that the Commissioner ‘commits an act of dialectical unreasonableness’. The latter may also be described as process-based unreasonableness as the Commissioner is alleged to have committed a (latent) gross irregularity by failing to apply his mind to material relevant considerations¹.
- [14] The company focus has been on the purpose of the rule and in doing so has not fully addressed the issue about the existence of the rule and the Commissioner’s interpretation of the rule. Indeed, the company contends that the Commissioner became fixated on the definition of “family member” and had adopted an overly technical approach.
- [15] The Commissioner had considered the rule and concluded that the employee was not guilty of misconduct because, according to him, the rule that he was alleged to have breached, did not exist. I cannot fault the Commissioner’s reasoning. The Labour Relations Act requires him, in considering whether an employee is guilty of misconduct, to establish the breach of a valid rule. I do not agree that he acted in an overly technical manner. He did not act unreasonably in concluding that the ordinary meaning or “family member” ought to be ascribed to the rule; that doing otherwise would amount to amending the rule; and that the definition of “family member” did not include the husband of the sister of the employee’s girlfriend.
- [16] Did the Commissioner commit a gross irregularity by failing to apply his mind to the purpose of the rule that the employee is alleged to have breached? I do not consider the Commissioner to have done so. The company contends that he ought to have considered the purpose of the

¹ *SA Airways (Pty) Ltd v Blackburn and Others* [2010] 3 BLLR 305 (LC)

rule in interpreting it. The Commissioner clearly considered attributing another meaning to the rule would amount to amending the rule. Once he concluded the rule not to apply and therefore not to have been breached he did not have to consider the purpose of the rule.

- [17] While the purpose of the rule may be commendable, the company does not say why it had not amended the rule specifically to include a prohibition on employing any persons that would serve to undermine the purpose of the rule. The purposes for which the company contends the rule exists would apply equally, for instance, to close friends. The rule, as phrased, cannot be interpreted to include close friends even though one may argue that the purpose would be to prohibit the employment of close friends. An interpretation relying on the purpose of the rule would be stretching matters. The company ought to have amended the rule to widen it so that it applied to the employment of anyone which may result in bias, favouritism, conflict or inconsistency.

Conclusion

- [18] It is not the correctness of the commissioner's decision that is relevant but whether the result of the arbitration proceedings is reasonable. I find the decision of the commissioner that the dismissal of the employee was substantively unfair was a reasonable one on the basis of the evidence available to him.
- [19] In the circumstances, I find that the conclusion reached by the commissioner was justifiable in relation to the evidence before him and that the arbitration award must stand. The application to review and set aside the arbitration award, accordingly, fails.

Order

- [20] Accordingly, I make the following order:
1. The application to review and set aside the arbitration award made by the first respondent under the auspices of the second

respondent under case number MP 7589 – 11 dated 27 December 2011 is dismissed.

2. Each party is to pay its own costs.

Haffegée AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr A Postuma of Snyman Attorneys