



**REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT**

Reportable

Case no: JR 2413/10

In the matter between:

PSA OBO LETSOALO

Applicant

And

COMMISSIONER M K MALEMA N.O

First Respondent

GPSSBC GAUTENG

Second Respondent

DEPARTMENT OF HOME AFFAIRS

Third Respondent

Heard: 13 September 2013

Delivered: 08 April 2014

Summary: Application to review –The arbitration award reviewable- the Commissioner committed a material errors of law and facts. Commissioner is ruling to appreciate the provisions a section 18(6) of the Immigration Act considering condonation for the late filing of the extinction of residence and work permit, by the Applicant

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside the arbitration award of the first respondent (the arbitrator) made under case number GPBC675/2010 dated 2 August 2010. The applicant filed the review application because he was unhappy with the finding of the arbitrator that his dismissal was fair and accordingly, dismissed his alleged unfair dismissal claim.

Background facts

- [2] The applicant, Mr Letsoalo at the time of his dismissal, was employed as a senior administrative officer, responsible for adjudicating applications for work permits of foreign citizens including consideration of the extensions thereof. The applicant was accused of wrongfully approving the extension of the work permit of Mr Patel, who is of Indian nationality. The allegation was that he failed to follow the prescribed procedures in dealing with the extension of the work permit of Mr Patel. In the alternative, the applicant was charged with prejudicing the administration and discipline of the third respondent.
- [3] It is common cause that the applicant received an application for an extension of the work permit from Mr Patel. Mr Patel had previously received a work permit which had expired. His reason for the late application of the extension of the work permit was based on health reasons.
- [4] The applicant was found guilty and dismissed from the employ of the third respondent on 11 August 2009. Being unhappy with the outcome of the disciplinary hearing, the applicant referred the matter for conciliation and subsequently to arbitration. The outcome of the arbitration award was that the dismissal was for a fair reason.

The arbitration award

- [5] The Commissioner based his conclusion that the dismissal of the employee was for a fair reason on the following findings:

- ‘18.1 This case is an arbitration case and therefore is a *de novo* hearing on the facts supporting either party’s case. The applicant must prove that his handling of Mr Patel’s application was a proper in the circumstances, and this is where the applicant encountered serious difficulties.
- 18.2 Mr Patel’s so-called original (existing) permit was extinct- as having expired by the time an application for its extension was made or renewal was lodged. I find that it was not capable of being renewed or extended.
- 18.3 The applicant mentioned his consideration of Mr Patel’s medical reasons, but there has not been evidence tendered of those medical reasons on record.
- 18.4 In his consideration of that late application the, applicant failed to observe prescribed procedures as laid down in the regulations, among the most important are those mentioned under paragraph 11.1 above.
- 18.5 There was undoubtedly confusion which in my view remains as to the identity of the company or organisation with which Mr Patel entered into a contract of employment. The applicant has not cleared in his case, and he just did not.
- 18.6 The purpose of the application for the extension of the wok permit and the applicant’s reasons for approval that application was mutually destructive in respect of the company or organisation with which Mr Patel intended to take up employment.
- 18.7 There has also been a material omission by the applicant to tender evidence of his consideration if ever, of those documents which he insist were required to be attached to the application in spite of the fact that they had to be considered in handling the application.’

[6] The arbitrator further found that because the initial permit had expired at the time the application for the extension of the permit was made, Mr

Patel was an illegal immigrant and therefore his permit “was no longer capable of renewal or extension.” Furthermore, the arbitrator found that Mr Patel’s application did not “satisfy the requirements of the Government Gazette No 27725,” in that the following information was amongst others not provided in the application for the extension of the temporary permit:

- a. Medical and radiology report
- b. Contract signed by both applicant and the employer
- c. Original advertisement of the job in the national media
- d. List of shortlisted candidates for the interview
- e. Proof of the registration of the employer with the Registrar of Companies.

Grounds of review

- [7] The applicant contends that the arbitrator ignored his evidence regarding the medical reasons provided by Mr Patel and also the evidence of the respondent’s witnesses who testified that, had the application been brought before them, they would have also approved the extension of the work permit.
- [8] The applicant further contends that the arbitrator, in arriving at his conclusion, failed to appreciate the provisions of regulation 18 (6) (a) of the Immigration Act which makes provision for condonation of the late application for an extension of the work permit by a senior administrative officer.
- [9] In the supplementary affidavit, the applicant contends that the arbitrator, in arriving at the conclusion that his dismissal was fair, applied an incorrect test of the onus of proof. It is also contended by the applicant that no reasonable decision maker could have arrived at the decision reached by the arbitrator. It is contended in this regard that

the arbitrator incorrectly analysed the evidence which was placed before him.

The third respondent's case

- [10] The case of the third respondent as per the testimony of its main witness and senior adjudication officer, Ms April, at the arbitration hearing, was that Mr Letsoalo ought to have rejected Mr Patel's application as at the time the application was made he (Mr Patel) was already an illegal immigrant. The third respondent further contended that the permit should not have been extended because Mr Patel did not attach all the relevant documentation as required by the law.
- [11] The third respondent further contended that the application should have been rejected because Mr Patel was being employed by a different company to the one mentioned in the initial application for which the temporary permit was granted. The contention, in this regard, is that the permit was granted on the basis that Mr Patel would be working for Bhatiya Import and Export CC but the extension was sought for the purposes of taking employment with Internet Cellular.

The case of Mr Letsoalo

- [12] The first witness in support of Mr Letsoalo's case was Mr Mtsweni who testified that Mr Patel had in the initial application attached all the relevant documentation required by the law. According to him, it was not necessary to attach the same when he applied for the extension of the permit because that documentation could, if needed, be retrieved from the file.
- [13] Mr Letsoalo in support of his case testified that the first thing that he noted when he received Mr Patel's application was that the initial permit had expired. It was for that reason that he summoned him to the office to enquire about the reason for the delay in filing the application. The other reason for calling him to the office was to enquire as to

whether he was still working for the same company whose name was on the initial application.

- [14] Mr Patel denied having resigned from Bhatiya and stated that he was still employed by the same company. As concerning the reason for the delay in filing the application for the extension of the permit, Mr Patel stated that it was because of “medical reasons.” It was for that reason and the fact that the delay was only eight days that Mr Letsoalo condoned the late filing of the application and thereafter granted the extension.

Evaluation

- [15] It is now well established that the test to apply when considering whether to review an arbitration award is that of a reasonable decision maker which entails enquiring into whether the decision which is the subject of the review is one that a reasonable decision maker could not have reached.¹
- [16] In the present instance, the decision reached by the arbitrator is, with due respect, unreasonable for two main reasons. The first concerns the test he adopted in dealing with the issue as to who has onus to proof the fairness of the dismissal. The second reason which is closely related to the first has to do with the approach the arbitrator adopted in dealing with the facts, the circumstances and the legal issues relating to the misconduct for which Mr Letsoalo was accused of having committed.
- [17] It is trite that in dismissal for misconduct cases the onus to show that the dismissal was for a fair reason rests with the employer and not the employee.² What the employee has to prove is that he or she was

¹ See *Sidumo and Another v Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110 and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) and Others* [2014] 1 BLLR 20 (LAC) at para 13.

² Section 192 of the LRA which reads as follows: ‘(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. (2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.’

dismissed. The issue of dismissal was common cause in the present instance.

[18] It is apparent from the reading of the arbitration award that the arbitrator in the present instance placed the onus on the employee, Mr Letsoalo, to prove that his dismissal was unfair. In this respect, the arbitrator as indicated above found that Mr Letsoalo, had to prove that he had handled the application for the extension properly.

[19] The arbitration award stands to be reviewed for the above reason alone. It further stands to be reviewed also because the arbitrator misconceived in a fundamental manner the issue he had to deal with and consequently committed both material errors of facts and the law.

[20] The key issues which the arbitrator had to determine relate to the following:

- a. The powers of Mr Letsoalo to adjudicate applications for work permits and if he had;
- b. Whether he exercised his powers properly in relation to:
 - i. considering and granting condonation for the late filing of the application to extend the temporary permits,
 - ii. considering the extension of the application without the documentation required by regulation 6.5 of the Regulations.

[21] The grounds upon which Mr Letsoalo could have been found guilty of the charges against him were if the answers to the above were in the negative. It has not been disputed that Mr Letsoalo had the power prior to his dismissal to consider applications for work permits including condonation for the late filing of such applications. The power to consider condonation for the late filing of the extension of work permits is derived from regulation 18(6) which reads as follows:

‘A foreigner who is in the Republic and applies for a change of status or conditions relating to his or her temporary residence permit, or for an extension of the period for which the permit was issued, shall submit his or her application at least 30 days prior to the date of expiry of that permit: Provided that –

- a) In the case of a permit issued for less than 30 days; or
- b) Where such foreigner failed to comply with this sub-regulation, the application shall only be accepted within the validity period of the permit and upon the foreigner having demonstrated to the satisfaction of the Director General that good cause exists for acceptance of the late application.’

[22] In relation to the submission of the documentation when applying for the extension of the permit, sub-regulation (5) reads as follows:

- ‘(5) An application is not required to submit documents that is already in the possession of the Department and which can be retrieved or copied from the records of the Department.’

[23] One of the reasons for finding Mr Letsoalo guilty of failing to comply with the provisions of the regulations was that he considered the application without the documentation referred to in the regulations. In this regard, with due respect, the arbitrator failed to apply his mind to the facts and the law.

[24] The essential fact which was common cause was that the documentation in question was attached in the initial application and therefore in law Mr Patel was not required to attach same in the application for extension. The law also gave Mr Letsoalo the discretion, as the administrative officer responsible for considering application of this nature, to process the extension applications without requiring production of the documentation in question. It is apparent that in exercising his discretion, as he was legally entitled to, Mr Letsoalo did not call for the documentation. This was the understanding of the witnesses of both parties. Even Ms April seems to have accepted

during cross examination that in a case of the renewal and applicant does not serve to submit documentation that is already with the department.

- [25] The other issue which the arbitrator failed to appreciate and accordingly made a finding that no reasonable arbitrator could have made, concerns the condonation application itself. It is apparent from the reading of regulation 18 (5) that an officer in the position of Mr Letsoalo has the power to grant condonation for the late filing of an application to renew or extend the expired permit.
- [26] Although Ms April suggest that in her testimony that Mr Patel should have submitted the letter to the director general stating the reason for the late filing of the application, it, firstly, has to be noted that the testimony was contradictory in this respect. She testified that the application should not have been entertained because the initial application had expired. In other words, even if there were good reasons for the late filing of the extension application, that application on her version, should not be entertained in law at all. She later says that a letter should have been submitted to the Director General seeking condonation for the late filing of the extension application.
- [27] It is important to note that the regulations do not prescribe the manner and the form for an application for condonation for the late filing of an application to renew or extend an expired permit. It is also important to note that it was not the case of the Department that Mr Letsoalo did not have the power to condone the late filing of the renewal one of the permit.
- [28] In my view, had the arbitrator appreciate that the issue that he was dealing with, he would do found that the approach adopted by Mr Letsoalo in dealing with Mr Patel's application was in line with the broad principles adopted by the Courts and other dispute resolution bodies whenever confronted with an application for condonation for non-compliance with the timeframes set out in the law.

- [29] The arbitrator seems to suggest in his finding that Mr Letsoalo did not apply his mind properly in considering the condonation in that “there has not been evidence tendered of those medical reasons on the record.” There is nothing in the Act or the regulations that requires a medical certificate to be attached when applying for condonation for the late filing of an extension or renewal of the permit.
- [30] It is apparent that Mr Letsoalo granted condonation on the basis that he found the explanation for the delay to have been acceptable and reasonable and also that the duration of the delay was not excessive. It has to be noted in this regard that the department did not make case during the arbitration proceedings that the condonation was granted for illegal or ulterior motives.
- [31] There is a suggestion in the departments answering papers that the case of Mr Letsoalo came about because of the investigation which was conducted in the Pretoria and Tzaneen offices. This evidence was never placed before the arbitration proceedings and therefore deserves no consideration in this review application.

Conclusion

- [32] As indicated above, the arbitrator committed errors of law and fact in arriving at the conclusion that Mr Letsoalo was guilty as charged. In law, in the first instance Mr Letsoalo had the authority to consider applications for work permits, the extensions of the period thereof including granting condonation where the application for the extension is late. Secondly, he also in law had the authority to consider applications for extension of permits without calling for documentation submit in the initial application.
- [33] In summary, the facts which are undisputed are: Mr Patel was granted a temporary work permit. He was late in applying for its extension. He was called into the offices of the department after submitting his application for the extension of the permit by Mr Letsoalo to enquire as to the reason for late application. It is apparent that Mr Letsoalo was

satisfied with the explanation and accordingly granted the extension of the permit and did so without requiring him (Mr Patel) to submit documents which he had submitted in the initial application.

[34] It is for the above reason that I find that the decision reached by the arbitrator is one which no reason decision maker could have reached. A reasonable decision maker taking into account the provisions of the law, the facts and the circumstances of this case could have found that the dismissal of Mr Letsoalo was substantively unfair.

[35] In light of the above, I find that the applicant has made out a case warranting interference with the arbitrator's arbitration award. I see no reason why costs should follow the results.

Order

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

1. The arbitration award made under case GPBC675/2010 dated 2 August 2010, is reviewed and set aside.
2. The arbitration award is substituted with an order to the effect that:
 - i. The dismissal of Mr Letsoalo was substantively unfair.
 - ii. The third respondent is ordered to reinstate Mr Letsoalo retrospective to the date of his dismissal without loss of any benefit.
3. The third respondent is to pay the costs of the applicants.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate P Kirstein

Instructed by: Couzyn, Hertzog & korak Attorneys

For the Respondent: Advocate M Gumbi

Instructed by: State Attorneys