



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1839/2012

In the matter between:

MOKGALABONE, IRENE DITEBOGO

Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

RAFFEE, MOHAMED, N.O COMMISSIONER

Second Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Third Respondent

Heard: 6 March 2014

Delivered: 26 May 2014

Summary: An award which falls within bounds of reasonableness is not susceptible to review.

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 arbitration award of the second respondent (“the commissioner”) in which he found the applicant’s dismissal substantively and procedurally fair. The applicant delayed in prosecuting her review application prompting the third respondent to file an application for the dismissal of her review application owing to the excessive and undue delay in its prosecution.

Dismissal application

- [2] The review and dismissal applications were argued simultaneously. I will firstly determine the dismissal application. Pursuant to her dismissal, the applicant referred an unfair dismissal dispute to the first respondent. The commissioner issued the arbitration award on 12 June 2012 and the applicant filed her review application within the six weeks period prescribed in section 145 of the Labour Relations Act 66 of 1995 (the LRA). The first respondent dispatched the record to the Registrar on 26 September 2012. The applicant filed the record of the arbitration proceedings on 20 May 2013. The third respondent filed an application in terms of Rule 11 for the dismissal of the review application on 7 May 2013.
- [3] From 15 November 2012, the third respondent addressed letters to the applicant enquiring about the review application. It made enquiries about the applicant’s failure to file the record, put pressure for the record to be file and threatened to file this dismissal application. The third respondent’s efforts culminated in the filing of this application on 8 May 2013. The applicant failed to answer to some letters and took too long to answer others. She also made empty promises to deliver the record. The applicant attributed the delay to her impecuniosity. She explained that she was unable to pay the costs of the transcription of the record as she had no source of income after her dismissal. She further submitted that the firm which transcribed the record was responsible for part of the delay.

- [4] In *Meitjies v New Tyre Manufacturers Bargaining Council and Others*¹ it was held as follows:

‘It is trite that the court has a discretion to bar an applicant who fails to provide reasonable and satisfactory explanation for the delay in timeous prosecution of his or her review application. The approach to be adopted when dealing with the issue of unreasonable delay has received attention in a number of both Labour Court and Labour Appeal Court cases. The courts in considering whether to uphold an application for the dismissal of a review on the ground of want of prosecution take into account the following:

- (a) Is the delay in the prosecution of the matter excessive?
- (b) Is there a reasonable explanation for the delay?
- (c) What prejudice will the other party suffer if the dismissal is not granted?
- (d) Are there prospects of success in the main case?’

- [5] The delay in the filing of the record is excessive in that the applicant took about seven months to file it. Although the applicant’s attorneys could have handled the queries about the delay in the filing of the record better, the applicant cannot be denied of the right to be heard because of her inability to raise an amount in excess of R4000 to pay for the transcription of the record at a time she was unemployed. The delay by a company responsible for transcribing the record cannot be visited on the applicant. I, therefore, conclude that the applicant proffered a reasonable explanation for the delay.

- [6] The prejudice that the applicant will suffer in the event of this application being granted is that she will lose her right to be heard. This court does not take the decision to deprive a litigant of the right to be heard easily. The decision to non-suit a litigant affects rights enshrined in the Constitution. The test whether the applicant has prospects of success is whether she could be successful in the main application. A consideration of the review application shows that if the applicant can prove the averments made in her review application, she could be successful.

¹ (2012) 33 ILJ 1725 (LC) at para 30.

- [7] The prejudice the third respondent stands to suffer is not much. There is no danger of the unavailability of witness or memories having faded as the review application is based on the record before court. At the time this application was set down for hearing, the review application was also ripe for hearing as a result the applications were heard simultaneously. The prejudice which was caused by the delay can be compensated by an appropriate costs order. For these reasons, the application to dismiss the review application is dismissed. The third respondent did not act unreasonably in bringing this application, it will therefore not be appropriate to grant a costs order against it.

The review

- [8] The facts of this matter are mainly common cause. They are that the applicant was employed by the third respondent in the position of Standard Executors and Trustees. On 1 October 2009, she became the Business Banking Risk Manager reporting to Mr Cullen (Cullen). From November 2010, she reported to Mr Thompson (Thompson). Amongst the applicant's responsibilities as a Business Risk Manager was the provision of risk management support to Mr Govender (Govender), the Director of Procurement and Logistics.
- [9] The third respondent required its employees to declare their business interests and those of their family members quarterly in order to avoid a conflict of interests, in a declaration of interest ("DOI") standard form which was countersigned by their line managers. In June 2011, the applicant took a two weeks' compassionate leave. On her return, on 28 June 2011, she countersigned three DOI forms prepared by Govender for the last quarter of 2010 and the first two quarters of 2011. The DOI's were signed by Govender on 29 October 2010, 11 February 2011 and 27 April 2011 respectively. Pursuant to an investigation which involved Govender's suspicious conduct, the applicant was charged with "alleged dishonestly in that [she] misrepresented declaration of interest for Meshem Govender by co-signing the documents in July 2011". She was found guilty and dismissed. Her efforts to have her dismissal at the first respondent declared unfair were unsuccessful. She launched this application to have the decision of the second respondent ("the commissioner") reviewed and set aside.

Grounds for review

- [10] The applicant submitted that the commissioner failed to consider properly or at all the totality of the circumstances of her case. Such circumstances include the third respondent's evidence, substantive fairness of the dismissal and the charge which had been preferred against the applicant. The failure, according to the applicant, led the commissioner to find that the applicant was dishonest and misrepresented Govender's declaration of interest. The applicant further submitted that the award was rendered reviewable by the commissioner's finding that the third respondent did not act inconsistently.

The test for review

- [11] The test for review is settled, it is whether the decision reached by the commissioner is one a reasonable decision maker could not reach.² The correct approach in reviewing an arbitration award is to consider the arbitration in its totality.³

The award

- [12] In the reasons for his decision, the commissioner took into account that the applicant was legally qualified. She would therefore understand the consequences of signing a date which purports not to be the date on documents. She had signed on three occasions, three documents not on the date reflected on them. He considered disingenuous the applicant's version that the forms were defective in that there was no date inserted for her at the time of signature. Although she was influenced to sign the DOIs by her trust in Govender, the medication she had taken, the confusion she had as she had just returned from a funeral, Govender being in a hurry, Jorg unwilling to sign the documents, Johan had been retrenched and the documents could not be found. Signing the DOIs did not bode well with the applicant. She could not explain why she did not report the incident on the fraud hot line, at the human resources department or

² See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110.

³ *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC).

to her line manager. She instead disclosed the incident to a colleague on the basis that if anything was to happen to her, he should know. The commissioner also took into cognisance the need for high integrity in the banking industry and that the applicant's conduct compromised her integrity. He rejected the applicant's version that the third respondent acted inconsistently in the manner it treated her subsequent to the discovery of Govender's fraudulent activities. He found that there was insufficient evidence to conclude that the applicant's dismissal was procedurally unfair.

- [13] It was urged on behalf of the applicant that the commissioner made a decision a reasonable decision maker could not reach on the evidence before him, firstly, because in reaching his decision he conducted an incorrect enquiry. The proper enquiry was whether the applicant was guilty of dishonesty when signing the documents and not whether she was wrong in signing documents that she should not have signed. The commissioner was wrong, so went the argument, in finding that the applicant should have known better. The weakness of this argument is that it overlooks the test for review and that the error, if it was made, did not render the award reviewable.
- [14] A proper reading of the award reflects that when analysing the evidence and arguments, and giving reasons for finding the applicant's dismissal substantively fair, the commissioner stated, *inter alia*, that the applicant's conduct compromised her integrity. Integrity connotes honesty.
- [15] In an attempt to prove the unreasonableness of the award, the applicant argued that her version, that there were no dates on the DOIs when she signed them, was not gainsaid. The commissioner rejected her version as disingenuous and gave reasons for his finding which include the applicant's failure to lodge an official report of the incident.
- [16] The applicant's argument that on the third respondent's own version, the DOIs became valueless when signed by the applicant is of no moment because it does not sanitize applicant's dishonest conduct. The record is replete with evidence supporting the commissioner's finding that the applicant's conduct compromised her integrity. She informed Mr Pretorius ("Pretorius") over the telephone and in person when he was investigating allegations of misconduct against Govender that the DOI forms in

question were signed quarterly on the dates reflected on them. She maintained her untruthful version even in a meeting with Pretorius on 19 July 2011. She only told the truth when cornered by Pretorius. She conceded that she misrepresented the true facts by back dating the DOIs.

- [17] The applicant denied having committed fraud. The submissions on the applicant's innocence in connection with fraud are irrelevant as she was not dismissed for committing fraud. None of the findings reached by the commissioner are based on fraud.
- [18] The applicant did not prove valid grounds to have the award reviewed and set aside. The award therefore falls within bounds of reasonableness, in that the commissioner dealt with the principal issue before him, analysed the evidence and reached a reasonable conclusion.
- [19] The third respondent sought a costs order against the applicant. Requirements of both the law and fairness justify a costs order against the applicant for her conduct of proceeding with this matter when it was at all times clear that she had no valid grounds to mount her attack on the arbitration award.
- [20] In the premises, the following order is made:
- 20 .1 The application for review is dismissed with costs.

Lallie, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate R.S. Willis and Advocate M. Naidoo

Instructed by Mashiane Moodley & Monama Inc

For the Third Respondent: Mr D. Cithi of Mervyn Taback Inc

LABOUR COURT