



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

CASE NO C 417/2013

Not reportable

In the matter between:

SANLAM LIFE INSURANCE

APPLICANT

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

COMMISSIONER J PIENAAAR

BASIL WAYNE FORBES

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

Application heard: 20 March 2014

Judgment delivered: 3 April 2014

JUDGMENT

VAN NIEKERK JIntroduction

- [1] This is an application to review and set an arbitration award made by the second respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner held that the applicant had committed an unfair labour practice in the form of unfair conduct in relation to the third respondent's demotion, and awarded the third respondent (Forbes) compensation of R 673 920, a sum equivalent to six months' remuneration.

Factual background

- [2] The material facts are recorded in the commissioner's award and I do not intend to repeat them here. It is sufficient for present purposes to record that applicant employed Forbes in September 2010 as Head: Market Intelligence. On 1 April 2012, Forbes was promoted to Head: Group Intelligence, a post graded at a level reserved for the applicant's most senior management. The applicant contends that the latter post was made redundant in late 2012.
- [3] It is not disputed that Forbes's employment was terminated in December 2012 on account of the applicant's operational requirements, and Forbes was denied a severance package by the applicant on the basis that he refused to accept what it considered to be an offer of reasonable alternative employment.
- [4] The applicant contends that as an alternative to retrenchment, Forbes was offered the (lower) post of Head: Group Corporate Affairs, and that Forbes refused the offer. The applicant thus denied the existence of any demotion. Forbes contends that he was appointed to the post of Head: Group Corporate Affairs in terms of a letter addressed to him by the applicant's chief executive officer (Van Zyl) on 7 November 2012 and thus demoted without prior consultation and without his consent.

The commissioner's award

- [5] As I have indicated, the commissioner made a factual finding to the effect that Forbes had been demoted, and went on to find that his demotion was unfair. The commissioner's reasoning is reflected in the following paragraphs of his award:

'[47] The Applicant's job grade was reduced from 99 to 15, and he was no longer to report to Dr Van Zyl, the Group Chief Executive Officer but to Ms Ramiah. His functions and responsibilities, and rank, at Head: Corporate Affairs were not comparable with his functions and responsibilities, and rank, at Head: Group Intelligence.

[48] Ms Ramiah was at first adamant that the post of Head: Corporate Affairs did not constitute a demotion, but conceded under cross examination that it did. The evidence that the post had great potential does not take the matter further. Ms Malan was not prepared to concede the obvious, emphasising that the post Head: Corporate Intelligence compared reasonably with the applicant's post as Head: Group Intelligence.

[49] The applicant proved that his appointment as Head: Group Corporate Affairs meant that his responsibilities and status, had been reduced, and that he was demoted.'

- [6] The commissioner went on to find that the first respondent's demotion was unfair, principally because the applicant had not negotiated with the first respondent before his appointment as head: corporate affairs, and that the first respondent never consented to the appointment.

The grounds for review

- [7] The applicant's primary attack on the commissioner's award is directed at his finding regarding the existence of a demotion. The applicant contends that the evidence does not disclose the fact of a demotion and that the award stands to be reviewed and set aside on this basis. In this regard, the applicant contends that the court is required to determine the correctness of the commissioner's finding that Forbes was in fact demoted. It does so on the basis of the Labour

Appeal Court's decision in *SA Rugby Players Association (SARPA) & others v SA Rugby (Pty) Ltd & others* [2008] 9 BLLR 845 (LAC), where the court held, in a case where the existence of a dismissal was at issue, that the test to be applied is whether, objectively speaking, there were facts that served to give the commissioner jurisdiction to entertain the dispute. In other words, the applicable test is one of correctness; the commissioner's decision is not subject to a reasonableness review. The applicant submits that the commissioner's decision that Forbes had been demoted is without any objective basis and that it should be reviewed and set aside on that ground.

- [8] In relation to the merits of the commissioner's finding on the fairness of the demotion, should it be found that the third respondent was indeed demoted, the applicant submits that the test to be applied is that enunciated by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) recently affirmed by the Supreme Court of Appeal in *Herholdt v Nedbank* (701/2012, 5 September 2013). In the latter judgment the court summarised the position as follows:

'[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

- [9] In so far as the grounds for review relate to the reasonableness of the commissioner's award, In *Goldfields Mining South Africa (Pty) Ltd v CCMA* (JA 2/2012, 4 November 2013) the Labour Appeal Court confirmed that the applicable test does not admit what has been referred to as a "process-related

review”, at least in the sense that it is no longer open to a reviewing court to set aside an arbitration award only on account of a process- related irregularity on the part of the arbitrator. This has the consequence that the failure by an arbitrator to mention a material fact in the award, or to deal with any issue that has a bearing on the issue in dispute, or any error in regard to the evaluation of the facts presented at the arbitration hearing, is of no consequence. Provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the arbitrator’s decision is one that could not be reached by a reasonable decision-maker on the available material.

[10] The court set out the test in these terms:

‘[20] The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?’

[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork.

Analysis

- [11] I deal first with the applicant's contention regarding the existence of a demotion as a jurisdictional prerequisite. In *SA Rugby*, the Labour Appeal Court held that the issue of whether or not there had been a dismissal is an issue that goes to the jurisdiction of the CCMA (see paragraph 39 of the judgment). That case concerned a refusal by an employer to renew a fixed term contract. The same principle has been applied by this court in *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* (2012) 33 ILJ 363 (LC) in relation to a claim of constructive dismissal and again by the LAC in *De Millander v MEC Dept of Finance Eastern Cape & others* (2013) 34 ILJ 1427 (LAC), also in relation to a refusal to renew a fixed term contract. In the latter case, the court observed (at paragraph 26) that in *SA Rugby*, the court had observed that there was a statutory onus on an employee claiming unfair dismissal to establish the existence of a dismissal, and that the test to be applied to determine whether the employee had discharged that onus is objective. On that basis, it would seem, the court held that the question whether there had been a dismissal as defined by s 186 (1) involved a determination of the jurisdictional facts. On review, the court accordingly applied a test of objective justifiability, and not reasonableness.
- [12] In my view, unfair labour practice disputes stand to be resolved on a different basis. There is no statutory onus that obliges a claimant to establish the existence of an unfair labour practice. It is incumbent on an employee claiming to have been the victim of an unfair labour practice to establish both that the employer committed the unfair labour practice alleged, and that the employer's conduct was unfair. In a case such as the present, it is employer's conduct (whether by way of act or omission) in relation to a demotion that can legitimately form the basis of an unfair labour practice claim, it is not a demotion *per se* that gives rise to a cause of action. In these circumstances, it does not seem to me that the existence or otherwise of a demotion ought to be the subject of a discreet enquiry in the form of an objective determination of facts that would

give the CCMA jurisdiction. Simply put, it is incumbent on the employee to establish an act or omission by his or her employer that involves unfair conduct relating to a demotion. The commissioner must make a determination on that basis, and the resulting award is subject to review in terms of the reasonableness threshold established by *Sidumo*.

- [13] In the present instance, the referral document (Form 7.11) completed by the third respondent states the following:

‘I was instructed on 8 November 2012 to accept a lower level post which had neither definition nor any substantial functions and responsibilities. Should I decline to accept I would have no option other than to resign and walk away with absolutely nothing.

The above instruction/offer was in writing and handed to me on 7th of November 2012 with the heading “Your Appointment”. The letter contains unilateral changes of terms and conditions of my contract and contradicted the specific terms and conditions referred to in the letter dated 1 April 2012.

- [14] The applicant’s account of the meeting between him and Van Zyl on 6 November is instructive. He says the following:

‘ MR FORBES: Dr van Zyl basically said this is what he can offer, he advised me that these items will no longer be in the portfolio and that I said to him I need to understand what the full portfolio vision is and what needs to help in order to make up my mind and the decision was that I have to go speak to Yegs Ramiah to understand what the role will entail so that I can make up my mind.’

Not only did the applicant clearly view what Van Zyl conveyed to him as nothing more than an offer, it is apparent from the third respondent’s evidence that he accepted that the correspondence of 7 November was presented to him in that form. His evidence was that he fully appreciated that following the meeting with Van Zyl he was being considered for the alternative position and that he understood that the conditions of the offer remained to be finalised. His evidence

further discloses that on 12 November he remained in a position to accept or decline the offer and to question the available alternatives should he elect not to accept the offer. The third respondent clearly accepted that he had been presented with an offer in writing, which he elected ultimately not to accept. Of some significance is the fact that Forbes presented the applicant with a counter proposal. On 14 December 2012 the third respondent's attorneys addressed a letter to the applicant in which it was clearly stated that the third respondent would accept the role of Head: Corporate Affairs provided that his terms and conditions of employment remained unchanged. In cross examination, the third respondent cited the applicant's refusal to accept his counter proposal as the point at which his demotion took place. The third respondent's position is perhaps best summed up by his response to the question put by the commissioner:

'MR FORBES: I was asked to accept a demotion, and when I declined to accept the demotion I was dismissed.'

- [15] On the third respondent's own version therefore, he did not regard, as the commissioner found, the letter addressed to him by Van Zyl on 7 November to constitute a demotion. The commissioner's reasoning in relation to the existence of a demotion appears to have been driven by the content of the letter addressed to the third respondent by Van Zyl, and in particular, that the position of Head: Corporate Affairs was a position with lower status and less favourable conditions of employment than that then occupied by the third respondent. What the commissioner appears to have lost sight of is the fact that the letter constituted no more than an offer, open for acceptance or rejection. The first paragraph of that letter reads as follows:

'YOUR APPOINTMENT

I have pleasure in confirming our agreement and your appointment as Head: group corporate affairs, job grade 15, from 01 January 2013. In terms of this appointment your conditions of employment will change as follows....

- [16] The appointment of the third respondent to the position of Head: Group Corporate Affairs was therefore clearly predicated on the existence of an agreement between him and Van Zyl. The third respondent, on his own version, denied the existence of any such agreement; in fact, he rejected the offer and made a counter proposal. It would follow therefore, on the third respondent's version, that the letter from Van Zyl could not, as the commissioner found, have constituted an appointment to the position of head: group corporate affairs. In these circumstances, I fail to appreciate the basis on which any reasonable decision-maker would conclude that the letter presented to the third respondent was a *fait accompli*, at least in the sense that it represented a final decision to demote him regardless of his consent.
- [17] In short: it is clear to me, from a conspectus of all of the evidence, that the third respondent was never in fact demoted prior to the termination of his employment for reasons related to the applicant's operational requirements. The letter of 7 November, on the third respondent's own version and on the face of the letter itself, was no more than an offer, one that the third respondent rejected, and which led ultimately to the applicant's decision to retrench him. Whether that dismissal was substantively and procedurally fair is the subject of separate proceedings.
- [18] In view of the conclusion to which I have come on the first leg of the applicant's attack on the commissioner's award, it is not necessary for me to consider the applicant's submissions in relation to the reasonableness of the commissioner's conclusions regarding the fairness of the demotion that he found to exist.
- [19] Finally, in relation to costs, the court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of law and fairness. The court is traditionally reluctant to make orders for costs against individuals who pursue their grievances in a bona fide manner, or to close the doors of the court to individual litigants by erecting a barrier to entry in the form of the potential of an adverse order for costs. I propose therefore to make no order as to costs.

I make the following order:

1. The arbitration award issued by the second respondent under case number WECT 91-13 on 1 May 2013 is reviewed and set aside.
2. The award is substituted by the following:
“The applicant’s claim is dismissed.”

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Mr G Marinus, Werksmans Inc.

For the third respondent: Adv Nortje, with him Adv Zaytoen Cornelissen instructed by Henry van Niekerk Attorneys