

IN THE LABOUR COURT OF SOUTH AFRICA
(WESTERN CAPE LABOUR COURT, CAPE TOWN)

CASE NUMBER: C495/2013

5 DATE: 27 AUGUST 2014

In the matter between:

DEPARTMENT OF HEALTH: WC Applicant

and

P WOLFAARDT 1st Respondent

10 **PUBLIC HEALTH AND SOCIAL** 2nd Respondent

DEVELOPMENT SECTORAL BARGAINING

COUNCIL

J LE F PIENAAR N.O. 3rd Respondent

15 **J U D G M E N T**

STEENKAMP, J:

20 This is an application to have an arbitration award by the third
respondent, Commissioner J le F Pienaar, reviewed and set
aside. It arises from the demotion of the first respondent, Mr
Philip Wolfaardt, and a subsequent referral to the Public
Health and Social Development Sectoral Bargaining Council,
the second respondent, of an unfair labour practice dispute in
25 terms of section 186(2)(a) of the Labour Relations Act.

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The arbitrator found that the Department of Health Western Cape, that is the applicant, had committed an unfair labour practice and ordered the Department to restore Wolfaardt to his portfolio prospectively with effect from 1 July 2013. He
5 also ordered the Department to pay Wolfaardt compensation equivalent to ten months' remuneration.

In the review application the Department raises three grounds of review. The first is that the arbitrator's reliance on the
10 judgment of the Labour Appeal Court in Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services and Others 2008 (29) ILJ 2708 (LAC) was misplaced, or as Mr O' Brien put it, that the Commissioner "erred" in following *Nxele*. The second is that the arbitrator's finding
15 was unreasonable in terms of the test set out in *Sidumo*¹ and in *Herholdt*²; and the third is that the Commissioner "erred" in awarding compensation based on 10 months' remuneration.

At the outset we should remind ourselves that this Court on
20 review need not decide whether a Commissioner erred. That is not the test. The test is whether the decision reached by the Commissioner was so unreasonable that no other reasonable arbitrator could have come to the same conclusion.

¹ *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC).

² *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

I deal then firstly with the reliance on Nxele. I must confess that I find it difficult to understand how an arbitrator that relies on and follows the authority of the Labour Appeal Court can be criticised for that, much less that that could be stated as a ground of review. In fact, the Commissioner should be commended for following relevant and binding case law from the highest court of appeal in labour matters other than the Constitutional Court.

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In any event, the guidance in Nxele is clear. It is so that Zondo JP, as he then was, initially stated in paragraph 42 of that judgment, after quoting the provisions of section 186(2)(a):

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“In my view section 186(2)(a) of the LRA places an obligation on an employer not to engage in any unfair act ‘relating to [the] demotion’ of an employee. The demotion of an employee without his consent would, generally speaking, constitute an unfair labour practice in our laws.”

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Mr O’Brien jumped on the significance of the clause “generally speaking” to say that the arbitrator erred in relying on that authority in the case before him. However, in a case of

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demotion such as this, which is very much analogous to that of the transfer in Nxele, the authority is quite clear and spelled out by Zondo JP in paragraph 89:

- 5 “In terms of the Labour Relations Act the demotion of an employee without his consent would be unfair.”

That could not be clearer. I agree with Mr *Leslie* that it could
10 be envisaged that in circumstances such as a demotion as a disciplinary sanction, then quite obviously consent would not be required; but in a case such as the one before me and such as the one that served before the arbitrator, the arbitrator not only reasonably but correctly followed the authority of the
15 Labour Appeal Court.

The award is quite clearly not reviewable on that ground. Tempted as one might be to agree with Mr *Leslie* that that is dispositive of the review application, I will nevertheless deal
20 with the other grounds of review.

Mr *O’ Brien* conceded in his argument that his reliance on a “process related error” as set out in Southern Sun Hotel Interests v CCMA [2009] 11 BLLR 1128 (LC) was misplaced as
25 that case has been explicitly overturned in *Heroldt*. He
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nevertheless argued that the conclusion reached by the arbitrator was unreasonable.

I do not agree. The test, as the higher courts keep reminding
5 us, is a stringent one. For example, in Goldfields³ -- quoted,
ironically by Mr *O' Brien* -- the LAC pointed out that the
enquiry is not limited merely to whether the arbitrator had
perpetrated a gross irregularity in the proceedings, but
extends to whether the result was unreasonable or whether the
10 decision falls within a band of decisions a reasonable decision
make could make. It is not whether the arbitrator erred or
whether this Court would have come to the same conclusion.

And in Fidelity Cash Management Service v CCMA (2008) 29
15 *ILJ* 964 (LAC) at paragraph 100 the Labour Appeal Court again
stated:

“Whether or not an arbitration award or decision
or finding of a CCMA commissioner is reasonable
20 must be determined objectively with due regard
to all the evidence that was before the
commissioner and what the issues were before
him or her. There is no reason why an arbitration

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

award or finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that
5 existed which could demonstrate the reasonableness of the decision or finding or arbitration award.”

And the stringency of the *Sidumo* test was highlighted by Willis
10 J in Thebe Health Care v NBC Road Freight Industry 2009 (3) SA 187 (W) 201d-e where he said:

“As the famous saying goes, ‘*Quot homines, tot sententiae*’. Opinions, even among reasonable
15 men and women may differ, and at times markedly. If the test in a challenge to an administrative decision is whether the decision was one that no reasonable decision maker could reach, it will in practice be very difficult to
20 succeed.”

And so it is in this case. It is common cause that Wolfaardt was demoted and that he lost a quantity that was somehow quantified as 27,5% of his duties. It is common cause that it
25 was without his consent. The arbitrator took that into account
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and he took into account the test in Nxele. He then took into account the evidence and the facts before him and he came to the conclusion that that was unreasonable and that it constituted an unfair labour practice.

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There is nothing unreasonable in that conclusion. And even if this Court had disagreed with the conclusion, it was not so unreasonable that no other arbitrator could have come to the same conclusion.

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Mr *O' Brien* further attempted to argue that the Commissioner should have taken into account the reason for the demotion, and that is the operational requirements of the Department. The problem with that argument is that that is exactly what the Commissioner did. He stated pertinently in paragraph 34:

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“In the alternative, should it be said that sections 186(2)(a) and 189 of the LRA had tied the knot in marriage, and that the section 189 route followed by the respondent, as clearly stated in its reply to the applicant’s grievance to have been a decision taken ‘in the interest of meeting operational requirements’, was the correct route, the procedures required by section 189 were not followed.”

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He then took into account the evidence before him and noted that the employee was faced with a *fait accompli*:

5 “There was no meaningful joint consensus seeking process as required in terms of section 189 of the LRA.”

For that reason also he came to the conclusion that the
10 demotion was unfair. That is not an unreasonable conclusion.

Lastly, Mr *O’ Brien* took issue with the award of compensation. The arbitrator specifically referred to section 194(4) of the LRA which provides:

15 “The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months’
20 remuneration.”

I do not fully understand Mr *O’ Brien*’s attack on the award of compensation amounting to the equivalent of 10 months’ remuneration based on Minister of Justice and Constitutional Development v Tshishonga (2009) 30 *ILJ* 1799 (LAC). In that
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case the LAC stated in paragraph 15 that the court *a quo* had appeared to conflate the award of compensation with an amount of remuneration. The LAC then took into consideration various factors pertinent to a *solatium* and awarded a more significant sum as compensation for the indignity suffered by the employee in that case.

However, in the case before me, the arbitrator took into account that the employee is entitled to compensation:

10 "...not to compensate him financially, but to alleviate what he had to endure, and to put the respondent on guard not to ignore the rights of its employees, even in pursuit of a greater good."

15 It is in that context that he exercised his discretion to award a significant amount of compensation, but not the full amount capped at the equivalent of 12 months' remuneration. Instead, he considered compensation equivalent to 10 months' remuneration to be just and equitable. That is not an unreasonable exercise of the wide discretion that he enjoys in terms of section 194(4). He took into account the relevant facts and circumstances as I have outlined and it is on that basis that he came to the conclusion that compensation equivalent to 10 months' remuneration would be just and equitable.

As Mr *Leslie* pointed out in his heads of argument, the arbitrator has a wide discretion and even on appeal an appeal court will not likely interfere with the discretion exercised by the court *a quo*; much less so on review. In this regard I refer to Masuku v Score Supermarket 2013 (34) *ILJ* 147 (LC) at paragraph 10 and Numsa v Fibre Flair cc t/a Kango Canopies [2000] 6 BLLR 631 (LAC) at 634C.

10 The award of compensation awarded by the arbitrator in his discretion is not so unreasonable that no other arbitrator could have made such an award.

In conclusion, the award is not open to review. Both parties
15 asked that costs should follow the result. I see no reason in law and fairness to differ.

THE APPLICATION IS DISMISSED WITH COSTS.

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STEENKAMP, J

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APPEARANCES

APPLICANT: S C O'Brien

5 Instructed by The State Attorney, Cape Town.

FIRST RESPONDENT: G A Leslie

Instructed by Cliffe Dekker Hofmeyr Inc.