



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH.

JUDGMENT

Not Reportable

Case no: P561/11

In the matter between:

MZWANDILE TEMPLETON GWADANA

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

COMMISSIONER N GQAMANA

Second Respondent

KOUGA MUNICIPALITY

Third Respondent

Heard: 21 May 2013

Delivered: 6 June 2014

Summary: An employee may be dismissed owing to his or her incapacity to perform contractual obligations owing to incarceration if it is fair to do so.

Review in terms of section 145 of the LRA - Dismissal for misconduct.

JUDGMENT

LALLIE J

Introduction

- [1] This application was brought in terms of section 145 of the Labour Relations Act 66 of 1995 (The LRA) to review and set aside an arbitration award of the second respondent (the arbitrator). It is opposed by the third respondent.

Factual background

- [2] The facts of this matter are largely common cause. They are that the third respondent employed the applicant as an Area Engineer in Humansdorp. On 12 December 2010, the applicant was arrested for drunken driving. His bail application was unsuccessful and he was remanded in custody until 2 March 2011. He informed the third respondent of his incarceration through his attorney. On 8 February 2011, the third respondent addressed a letter to the applicant making enquiries about his inability to perform his contractual duties. He was asked to give the third respondent certain information including reasons for his inability to render his services, the extent of his incapacity, whether it was permanent or temporary and to provide alternatives to dismissal owing to incapacity. He informed the third respondent that he was incarcerated, awaiting trial and that he would appear in court in 1 March 2011. He was released on 2 March 2011 but re-arrested soon thereafter and his bail was estreated.
- [3] On 29 March 2011, the applicant addressed a letter to the third respondent through his attorneys confirming that he was still in custody and pleading with the third respondent not to dismiss him. The third respondent dismissed the applicant on 4 April 2011 for his inability to fulfil his contractual obligations. Aggrieved by the dismissal, the applicant referred an unfair dismissal dispute to the first respondent where the arbitrator found his dismissal substantively and procedurally fair in the award which is under review.

The award

- [4] Giving reasons for his decision, the arbitrator relied on *National Union of Mine Workers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others*¹ where it was held that an employee may be dismissed for incapacity when he/she is no longer capable of performing his/her terms of the contract of employment owing to imprisonment if it is fair in the circumstances for the employer to exercise that election.
- [5] Further evidence that the arbitrator took into consideration was that the applicant's inability to perform his contractual duties was beyond his control. He held a key position at the third respondent and his incarceration occurred during the festive season. He was afforded an opportunity to give reasons for his services not to be terminated. At the time of the termination of his services, the extent of his inability to render his services was not clear. The arbitrator found the applicant's dismissal substantially and procedurally fair.

Grounds for review

- [6] The applicant submitted that the award stands to be reviewed on the grounds that the arbitrator committed a gross irregularity in that he failed to apply his mind and establish, based on all the evidence before him, whether the third respondent had complied with provisions of item 10 of schedule 8 to the LRA. He failed to attach weight to material aspects of the evidence which included the third respondent's failure to take active steps to investigate whether the incapacity was permanent or temporary in nature. The arbitrator failed to consider whether all possible alternatives short of dismissal which included the third respondent continuing spreading the applicant's duties among his colleagues and securing a temporary replacement for the applicant. The applicant attacked the arbitrator for not taking into account his drinking problem and that his son's death traumatised him.
- [7] Another basis of the attack on the award is the arbitrator's failure to consider item 11 of schedule 8 and consider whether the applicant's duties could be adapted and the availability of suitable work. He failed to deal with the

¹ [2011] 11 BLLR 1041 (SCA).

appropriateness of the relief. The applicant submitted that the arbitrator committed a gross irregularity by failing to assess the evidence which served before him in terms of item 10 to 11 of schedule 8 to the LRA and chose to rely on irrelevant evidence of the letter written by the third respondent to the applicant enquiring about the extent of his incapacity, that the applicant occupied a key position and that the incarceration occurred during the summer festive season, that the applicant was afforded an opportunity to provide reasons why his services should not be terminated and assuming that the applicant could not be requisitioned from prison for purposes of attending a disciplinary enquiry. Another manifestation of the unreasonableness of the award, according to the applicant, is that at the time of the applicant's dismissal, the extent of his inability to render his services was unclear. Failure to play an inquisitorial role forms part of the grounds. Part of the evidence that the arbitrator failed to consider was that the applicant's position was vacant at the time of the arbitration and filled only thereafter. The arbitrator failed to consider the hardship of the dismissal on the applicant and his plea not to be dismissed.

The law of review

- [8] The test for review as enunciated in *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others*² is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. The correct approach in assessing whether an award is reasonable is stated as follows in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*.³

‘.... This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.’

- [9] The applicant adopted a shot gun approach. He identified everything that he thought the arbitrator did incorrectly and sought to rely on it as his grounds for

² 2008 (2) SA 24 (CC).

³ [2014] 1 BLLR 20 (LAC) at para 18.

review. He sought to rely even on contradictory grounds. By way of example, he attacked the arbitrator's finding that the applicant would not have been released from prison to attend a disciplinary enquiry but later conceded that it was perhaps impossible to convene a formal hearing and requisition the applicant.

- [10] In assessing whether the applicant has proved valid grounds for the award to be reviewed and set aside the evidence which served before the arbitrator needs to be considered in its totality. The arbitrator identified the main dispute before him correctly as the fairness of the applicant's dismissal for incapacity in that he could not perform his contractual duties owing to incarceration. The applicant argued that the arbitrator ignored material evidence and the duties of the employer summed up in items 10 and 11 of schedule 8 to the LRA. A reading of the LRA reveals that items 10 and 11 of schedule 8 deal with incapacity caused by ill-health and dismissal arising from ill-health or injury respectively. As the applicant's dismissal had nothing to do with ill-health or injury, the arbitrator cannot be faulted for not taking the provisions of items 10 and 11 of schedule 8 into account in reaching his decision.
- [11] The applicant argued that the arbitrator erred in concluding that his position was critical as it was frozen for financial constraints. He further criticised the arbitrator for not considering that Botha was performing the applicant's duties during his incarceration without extra costs to the third respondent. He further argued that the arbitrator failed to ask why his position could not be protected. He failed to apply his mind by unreasonably relying on the *Samancor* decision while ignoring material evidence and reached an unreasonable decision.
- [12] The third respondent defended the award on the grounds that it was reasonable. It was argued, on its behalf, that the applicant sought to rely on evidence not before the arbitrator and attempted to apply the incorrect test. A number of arguments were presented to support the conclusion that there were no grounds for interfering with the arbitrator's decision.
- [13] Having identified the main dispute, the commissioner analysed the evidence before him. The totality of the evidence led at the arbitration reveals that the

ruling that the applicant's position and the timing of his incarceration were critical is based on the evidence that Humansdop and St Francis Bay had a flood of tourists and people who have holiday homes in those areas, as it was the festive season. The arbitrator considered that the applicant was afforded an opportunity to be heard before the decision to dismiss him was taken. He was arrested on 12 December 2010 and dismissed three months later after he was afforded an opportunity to give reasons why he should not be dismissed. At the time of his dismissal, the applicant could not tell the third respondent the date on which he would be returning to work. The arbitrator cannot be faulted for relying on *Samancor (supra)* because his decision that the applicant was unable to perform his duties in terms of his contract of employment and that the third respondent acted fairly by dismissing him is not unreasonable. The enquiry the third respondent conducted, of asking the applicant about his absence was adequate as he was the one who had the relevant information which could assist the third respondent decide his future employment with it.

- [14] With regard to the mistakes that the arbitrator made and his omission to attach weight to some evidence tendered, the legal position is clear. It is expressed as follows in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*.⁴

'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 section 145 (2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145 (2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only 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'.

- [15] The applicant failed to prove how the arbitrator's errors led him to reach an unreasonable decision. The arbitrator dealt with the evidence before him and

⁴ [2003] 11 BLLR 1074 (SCA) at para 25.

reached a reasonable decision. When an award falls within bounds of reasonableness, there is no justification of reviewing and setting it aside. Enunciating the application of the test for review, the Constitutional Court held as follows in *Sidumo (supra)*:

‘To my mind, having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given that decision-making power to a commissioner’.⁵

[16] The argument that another decision maker acting reasonably could have reached a different decision does not constitute grounds for review. For these reasons, the application cannot succeed. I am not convinced that considerations of fairness justify the grant of a costs order.

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

16.1 The application is dismissed.

Lallie J

Judge of the Labour Court of South Africa

⁵ *Sidumo (supra)* at para 119.

Appearances

For the Applicant: Mrs Van Staden of the Justice Centre

For the Third Respondent: Advocate Grobler

Instructed by: Van der Walt Attorney

LABOUR COURT