



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P120/11

In the matter between:

LUYOLO NGINDANA

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER MZOXOLO MDLALANA

Second Respondent

SMALL ENTERPRISE FOUNDATION

Third Respondent

Heard: 21 May 2013

Delivered: 10 June 2014

Summary: Not every dissatisfaction the applicant has about an arbitration award constitutes grounds for review. An award which falls within bounds of reasonableness is not reviewable.

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

JUDGMENT

LALLIE, J

Introduction

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

Factual background

- [2] The applicant was employed by the third respondent in October 2008. On 1 May 2009, he was appointed to the position of development facilitator, a position he held until his dismissal. He was responsible for loans which were taken by groups from the third respondent. The applicant was suspected of having committed acts of misconduct when Ms Mushwana (Mushwana), the Butterworth Zonal Manager noticed inconsistencies during a spot check in the applicant's area of responsibility. The applicant was charged with writing false information in the repayment schedule of the Sisonke Centre and failure to prepare loan applications on time for clients and for changing the procedure by conducting centre meetings weekly instead of fortnightly. He was found guilty of the charges based on his plea and dismissed. His appeal was dismissed. He referred an unfair dismissal dispute to the first respondent where the commissioner issued an award in which he found the termination for his contract of employment fair. In this application, he seeks an order setting aside the award.

The award

- [3] The commissioner considered that as a micro loan lending undertaking the third respondent relied on development facilitators to secure clients who applied for loans, assisting the clients in applying for the loans and conducting centre meetings as he met the groups of client in centres. He compiled information in respect of loan utilisation and repayment. The third respondent had a pattern of giving loan. Clients started with R1000.00 loans, progressed to R1600.00, thereafter they would qualify for a R2800.00 loan. Keeping of correct records assisted the third respondent monitor the activities of its client

with the view of retaining them by offering the necessary assistance in the event of being in danger of losing them. The commissioner accepted the third respondent's evidence that the applicant deliberately supplied false information or falsified documents to reflect that clients who had dropped out of the loan programme were still existing clients. One of the consequences for providing false information is that the third respondent was denied of the opportunity of intervening timeously and retain clients. The commissioner rejected the applicant's explanation that it was common practice to replace clients who have exited the programme on the basis that the replacements did not reflect the true state of affairs. The applicant recorded replacements, not as new clients but as old clients who were in the second loan cycle. The commissioner rejected the applicant's explanation for his fraudulent travel claims as he could not give reasons for claiming for going to destinations that he did not claim for while he was reporting to Ms Malahla. He concluded that the applicant was aware of his wrongful conduct which amounted to dishonestly and found the sanction of dismissal appropriate.

Grounds for review

- [4] In his grounds for review the applicant narrated reasons for his dissatisfaction with the award. He complained that the award does not give a true reflection of the arbitration. The information was distorted. The commissioner found that two charges which the third respondent had dropped constituted dismissible acts of misconduct. The information in the award did not correspond with the evidence tendered at the arbitration. The third respondent held him responsible for misconduct committed by his predecessor. The commissioner found him guilty of recording that all the members of Masakhane group were in existence and for misconduct related to travel claims, in the absence of a policy precluding him from claiming travelling costs when working in a centre near his residence.
- [5] The thrust of the third respondent's opposition was that the grounds the applicant sought to rely on fall outside the realm of section 145 of the LRA. The test for review is whether the commissioner reached a decision a

reasonable decision maker could not reach on the evidence before the commissioner.¹

- [6] I have given the applicant's papers a generous interpretation because he drafted them without assistance by a legal practitioner. Mr Van Der Walt who assisted the applicant pro bono came into the picture very late after all the papers had been drafted. Most of his arguments were not fore-shadowed in his pleadings.
- [7] In determining whether the applicant has proved the existence of grounds on which the award can be review and set aside, I have to consider the grounds for review and the totality of the evidence which served before the arbitrator. Mr Van Der Walt sought to rely on the first ground for review by attacking the quality of the record. He however did not, in his argument, show how the award and not the record failed to give a true reflection of the arbitration. The distortion in terms of the first ground for review is not in the record but in the award. I have perused the record. It has its weakness I, however, am not convinced that the record does not reflect what happened during the arbitration proceedings especially when it is read with the grounds for review. In the first ground for review, the applicant did not disclose the nature of the distortion and failure to give a true reflection of the arbitration.
- [9] The applicant sought to rely on the commissioner's error of considering the charge of fraudulent travel claims which the third respondent had dropped. The charge is excluded from the list of charges which led from the applicant's dismissal. It is true that the commissioner erred in considering the charge. In *NUM and Another v Samancor Ltd (Tubatse Ferrochrome) and Others*,² the court expressed the following view in respect of an error by a commissioner:

'.... in those circumstances, I cannot see that the error that he made was material to the outcome. His reasoning shows that he would have reached the same conclusion, however, the dismissal was categorised. Least of all does it

¹ See *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110.

² [2011] BLLR 1041 (SCA) at para 12.

follow from his error that the award was so unreasonable that it fell to be set aside.'

[10] In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*³ the Court confirmed that when the error does not render the outcome unreasonable it does not constitute grounds for review. A consideration of the totality of the evidence in this matter also reflects that the error did not influence the outcome the commissioner reached.

[9] A consideration of all the evidence which served before the commissioner reveals that he dealt with the main dispute before him, evaluated evidence and reached a reasonable decision. There are, therefore, no grounds to interfere with his decision as it falls within bounds of reasonableness.

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

10.1 The application is dismissed.

Lallie J

Judge of the Labour Court of South Africa

³ [2013] 11 BLLR 1074 (SCA) at para 25.

Appearances

For the Applicant: Mr Van Der Walt of Van Der Walt Attorneys

For the Third Respondent: Mr Jacobsz of Jacobsz Attorneys

LABOUR COURT