



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P423/2011

In the matter between:

NEHAWU obo LUPHUMLO JAMES

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

JOHN CHEERE ROBERTSON N.O

Second Respondent

DEPARTMENT OF SAFETY AND LIAISON

Third Respondent

Heard: 27 February 2014

Delivered: 26 August 2014

Summary: An award may be reviewed and set aside when the arbitrator has exceeded his or her powers.

Review section 145 of the LRA – Dismissal for operation of the Public Service Act.

JUDGMENT

LALLIE, J

Introduction

- [1] In this application, the applicant seeks an order reviewing and setting aside an arbitration award of the second respondent ('the arbitrator') it is opposed by the third respondent.

Factual background

- [2] The individual applicant, Mr James ('James'), was employed by the third respondent as a community liaison officer. He was informed in a letter dated 24 August 2009 that the decision that he be discharged from the third respondent as from 30 June 2009 was confirmed. The confirmation was made in terms of section 17 of the Public Service Act 103 of 1994 as a result of absenting himself from his official duties without permission from 20 April 2009 to 29 June 2009. Aggrieved by the termination of his services, the applicant challenged the decision at the first respondent where the arbitrator issued the award the applicant seeks this court to review and set aside.
- [3] This application was filed 18 days late. Although the third respondent initially opposed the condonation application, it did not pursue the opposition when this matter was argued. The extent of the delay is not excessive. The explanation proffered for the lateness is reasonable and the applicant has good prospects of success. The applicant would suffer more prejudice than the third respondent in the event of the application being refused. I am satisfied that the applicant has shown good cause.

The award

- [4] The third respondent submitted that James absented himself from work without authority from 11 May 2009 to 29 June 2009. The applicant denied and submitted that his absence from work was interrupted as he performed his duties on some days during the impugned period. The applicant submitted that James was on duty from 11 May 2009 to 14 May 2009, 28 May 2009 to 29 May 2009 and on 29 June 2009. He conceded to being absent without permission from 15 May 2009 to 27 May 2009 and from 30 May 2009 to 28

June 2009. He was however not absent from work without permission for a period exceeding one calendar month. Notwithstanding the dates referred to in the letter confirming the decision to discharge James from the third respondent the arbitrator found, based on the evidence, that the relevant period for purposes of the dispute before him was 11 May to 29 June 2009. The arbitrator accepted that James attended official meetings on 14 May 2009. It is common cause that James reported for work on 29 May 2009. The arbitrator concluded that at no time was James away from work for a period exceeding one calendar month as required by the Public Service Act for his services to be automatically terminated by operation of the law.

- [5] The arbitrator found that James was absent from work without permission for the period 20 April 2009 to 13 May 2009, 15 May 2009 to 27 May 2009 and 30 May 2009 to 28 June 2009. The arbitrator further found that James' conduct constituted absenteeism as envisaged in Resolution 2 of 1999 (as amended) and it amounted to serious misconduct. He concluded that James' services were not terminated by operation of section 17 (3)(a)(i) of the Public Service Act but his conduct amounted to serious misconduct. He also found his dismissal procedurally unfair but substantively fair and granted him compensation equivalent to one month's remuneration calculated at his rate of remuneration as at 30 June 2009.

Grounds for review

- [6] The applicant submitted that the arbitrator exceeded his powers in dealing with the fairness of the termination of his services and making a pronouncement on the fairness of his dismissal as he was required to determine only the validity of the letter terminating his services. Alternatively, he erred in finding the dismissal substantively fair when comprehensive discipline was not applied. Dismissal was not appropriate. The applicant based its further attack on the award on the arbitrator's decision to rely on Resolution 2 of 1999 as no evidence in relation to the Resolution was tendered at the arbitration.

The law

- [7] Section 145 (2)(a)(iii) of the Labour Relations Act 66 of 1995 ('the LRA') recognises, as a ground for review, the arbitrator's conduct of exceeding his or her powers. In *Herholdt v Nedbank Ltd (Congress of South African Trade union as Amicus Curiae)*,¹ the court expressed the following view:

'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'.

In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*,² the Court confirmed that an award of a commissioner who has misconceived the nature of the enquiry is susceptible to review.

- [8] The arbitrator identified the dispute before him correctly as he recorded that the issue to be determined was whether James was dismissed for unknown reasons or his services were terminated by operation of the law. His powers were deliberately limited to identifying the reason for the termination of James' services only as each reason for the termination of his services is governed by a different regime of conflict resolution. A dispute arising from a dismissal for unknown reasons falls within the jurisdiction of the first respondent while termination of services by operation of the Public Service Act falls under the jurisdiction of the Labour Court. The arbitrator had no jurisdiction to determine the validity of the letter confirming the termination of James' services by operation of the Public Service Act. He therefore exceeded his powers by making a determination of the fairness of the dismissal for absence from work without the necessary authority.
- [9] The arbitrator had no authority to pronounce on the fairness of the dismissal for James' absence from work without authority as envisaged in Resolution 2 of 1999. The parties before him did not base their respective cases on the said

¹ 2013 11 BLLR 1074 (SCA) at para 25.

² [2014] 1 BLLR 20 (LAC) at para 22.

Resolution. He decided to find James guilty of a charge that he did not afford him an opportunity to defend himself against. He acted in breach of his duty to deal with the dispute before him fairly as envisaged in section 138 of the LRA. In *Yao Ying Metal Industry (Pty) Ltd v Pooe NO and Others*,³ it was held as follows:

‘An award may also not be founded on matters that occur to the arbitrator but that the parties have had no opportunity to address. That is simply an application of the principles of natural justice, and in particular the right to be heard, that are now formalized in the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).’

- [10] The award is defective as the arbitrator exceeded his powers and committed gross irregularities during the arbitration thus rendering his award reviewable.
- [11] Further the award stands to be reviewed and set aside because the arbitrator’s decision is incorrect. *SA Rugby Players’ Association (SARPA) & others v SA Rugby (Pty) Ltd & others, SA Rugby (Pty) v SARPY & another*⁴. *Apolo*⁵
- [12] The third respondent acted unreasonably in opposing this application when the arbitrator’s decision is palpably wrong and the defect in the award is obvious. Both the law and fairness in the circumstances justify a costs order against the third respondent.
- [13] In the premises, the following order is made:
 - 13.1 The application for condonation of the late filing of the review application is granted.
 - 13.2 The arbitration award issued by the second respondent under case number GPBC 62/2010 is reviewed and set aside.
 - 13.3 The matter is remitted to the first respondent to be arbitrated *de novo* by an arbitrator other than the second respondent.

³ [2007] 7 BLLR 583 (SCA) at para 6.

⁴ [2008] 9 BLLR 845 (LAC)

⁵ [2013] 5 BLLR 434 (LAC) at [19]

13.4 The third respondent pay the applicant's costs.

Lallie J

Judge of the Labour Court of South Africa

LABOUR COURT

Appearance

For the Applicant: Mr Ningiza of Ningiza Horne Incorporated

For the Third Respondent: Advocate Beningfield

Instructed by: The State Attorneys

LABOUR COURT