



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 2500/10

In the matter between:

MOGALE CITY LOCAL MUNICIPALITY

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

COMMISSIONER MATLALA N.O

Second Respondent

UASA obo S. MOKGATLA

Third Respondent

Decided : In Chambers

Judgment : 10 February 2015

Summary : Application for leave to appeal. There are no reasonable prospects of success on appeal. Application is dismissed with no order as to costs.

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

AC BASSON, J

[1] The applicant in this matter is the Mogale City Local Municipality (“the applicant”). The third respondent (Ms Mokgatla) was represented in the review

proceedings by UASA. I will refer to Ms Mokgatla as “the respondent”. The respondent was a Deputy Director: Department of Social Services of the Municipality.

- [2] The applicant in this matter was dismissed following a disciplinary hearing. She was charged with three acts of misconduct. Charge one consisted of 6 allegations of various acts of misconduct. I will return to these herein below. Charge 2 consisting of charges 2.1 – 2.4 did not form part of the review proceedings and the Court was not required to make any findings in respect of these charges. Charge 3 consisting of charges 3.1 and 3.2 dealt with abuse of sick leave.
- [3] In essence the respondent was found guilty of insubordination, failing to follow instructions, dishonesty and abuse of sick leave. The arbitrator held that the dismissal of the applicant was substantively unfair but procedurally fair. The arbitrator ordered the reinstatement of the respondent. The complete record of the disciplinary hearing was placed before the arbitrator in an attempt to curtail the proceedings. Comprehensive Heads of Argument were also submitted to the arbitrator.
- [4] The grounds for review are set out in the founding affidavit. In essence the applicant submitted that no reasonable commissioner “would have come to the conclusion that the dismissal was substantively unfair and that no grounds upon which to dismiss the 3rd Respondent existed.”
- [5] I am in agreement with the applicant that it is clear from the award that the arbitrator was somewhat confused about his role as an arbitrator and that the award is convoluted and difficult to read. I am, however, mindful of the duty of the review court and that it is ultimately the task of the review court to consider whether, notwithstanding some irregularities in the award, the conclusion reached was reasonable. It is certainly not the task of the review court to nit-pick on certain words used in the award. In essence also what the applicant submitted was that the arbitrator ignored “extreme inconsistencies” in the evidence of the respondent and that the arbitrator ignored “objective documentary evidence [that] clearly and undeniably indicated the dishonesty” in the version of the respondent. It was also submitted that the conclusion reached by the arbitrator was “fatally flawed”.

- [6] In argument the Court was referred to the specific instances in the record where the arbitrator failed to apply his mind to the evidence, failed to consider oral and documentary evidence before him, committed gross misconduct, failed to make credibility findings and findings on probabilities in instances where he was confronted with two mutually destructive versions.
- [7] The matter was fully argued and debated in Court on 11 September 2014. At the close of the proceedings this Court upheld the review with no order as to costs. In respect of the different charges the finding of this Court was as follows:
- (i) The finding in respect of charge 1.1 is reviewable and was set aside. This charge related in essence to the disrespectful and insubordinate manner in which the respondent acted towards her Executive Manager: Social Services – Mrs Mathebula (hereinafter referred to as “Mathebula”).
 - (ii) The finding in respect of charge 1.2 is not reviewable.
 - (iii) The finding in respect of charge 1.3 is reviewable and was set aside. This charge related to the fact that the respondent did not submit properly polulated performance agreements for a certain period of years.
 - (iv) The finding in respect of charge 1.4 is reviewable and was set aside. This charge related to the failure by the respondent to establish the Mogale City Sport Council despite direct lawful instructions to do so.
 - (v) The finding in respect of charge 1.5 is not reviewable.
 - (vi) The arbitrator made no findings in respect of charge 1.6
 - (vii) In respect of charges 3.1 and 3.2 which related to the abuse of sick leave the representative on behalf of the respondent conceded in argument that these two charges are reviewable.
- [8] This Court therefore reviewed and set aside the arbitration award on the basis, *inter alia*, that the respondent’s conduct in respect of the letters that she wrote to Mathebula were without provocation and were not only insolent but also disrespectful. The award was also reviewed and set aside on the basis of the concession made on behalf of the respondent that the findings in respect of charges 3.1 and 3.2 are reviewable.

[9] Charges 2.1 – 2.4 did not form part of these review proceedings. Before I turn to the reasons for my findings in respect of why charges 1.1, 1.3 and 1.4 are reviewable, I need to briefly refer to the charges 3.1 and 3.2. I have already indicated that the representative conceded that the findings in respect of these two charges are reviewable. These two charges read as follows:

“Charge 3.1

That you are guilty of misconduct by contravening paragraphs 2(d) and/or 2(b) of Schedule 2 of the Code of Conduct, by failing to act in the best interest of the Municipality and in such a way that the credibility and integrity of the Municipality is not compromised and by failing to perform the functions of office in good faith, diligently, honestly and in a transparent manner;

Read with paragraph 1,2,3 and 1,2,5 of the Disciplinary procedure by failing to perform her tasks and job responsibilities diligently, carefully and to the best of her ability and by failing to conduct herself with honesty and integrity;

In that the Employee abused her sick leave by absenting herself from work without the permission of Mrs Mathebula on various occasions but at least on 23 February 2007, 2 April 2007, 3 May 2007, 14 May 2007, 23 May 2007, 28 May 2007, 26 June 2007 and 27 June 2007.

Charge 3.2

That you are guilty of misconduct by contravening paragraphs 2(d) and/or 2(b) of Schedule 2 of the Code of Conduct, by failing to act in the best interest of the Municipality and in such a way that the credibility and integrity of the Municipality is not compromised and by failing to perform the functions of office in good faith, diligently, honestly and in a transparent manner;

Read with paragraph 1,2,3 and 1,2,5 of the Disciplinary procedure by failing to perform her tasks and job responsibilities diligently, carefully and to the best of her ability and by failing to perform the functions of

office in good faith, diligently, with honesty and in a transparent manner;

In that the Employee abused her sick leave by absenting herself from work without the permission of Mrs Mathebula during or about October 2007 by making false representations that she was ill and reported to be unable to work but attended a funeral.”

- [10] Although it was conceded on behalf of the respondent that the findings of the arbitrator are reviewable in respect of these charges, it must also be pointed out that these charges are serious especially if regard is had to the evidence that was led at the arbitration hearing. Consequently I am of the view that these charges – read on their own – justified a dismissal. In light of the concession that the finding in respect of these two charges is reviewable I will not proceed to give a detailed exposition of the facts that led to the institution and guilty finding on these two charges.

The test for review

- [11] The test for review is now well established and does not need elaboration. Suffice to point out what the Constitutional Court held in: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹

“To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”

- [12] In a recent Labour Appeal Court decision decided post *Sidumo* and post *Herold Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*² the Court held as follows:

¹ (2007) 12 BLLR 1097 (CC) at par [110]:

“[16] In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.

[18] In a review conducted under s 145(2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. 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.

[19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in s 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries*.

[20] An application of the piecemeal approach would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his or her award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or consideration of facts presented at the arbitration. 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 employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she 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? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?

² (2014) 35 ILJ 943 (LAC).

[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 & another NO v New Clicks SA (Pty) Ltd & 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.*³ 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. “”⁴

[13] Mrs Mathebula was the main witness on behalf of the applicant and gave extensive evidence about more or less every aspect of the different charges levelled against the respondent. Her evidence is particularly important in respect of charges 1.1; 1.3, 1.4 as well as charges 3.1 and 3.2. In light of the concession on behalf of the respondent I only intend to deal with those charges contained in 1.1; 1.3 and 1.4.

Charge 1.1

[14] The allegations contained in charge 1 deals with a failure on the part of the respondent to perform the functions of her office in good faith, diligently, honestly and in a transparent manner. *Inter alia* it is alleged that the respondent acted in an insubordinate manner on various occasions in that she had over an extended period of time through various written remarks and comments as well as various verbal comments acted disrespectfully towards Mathebula (charge 1.1).

[15] Despite overwhelming evidence to substantiate this charge the arbitrator came to the simply startling conclusion that he could not find specific instances of insubordination. It is, in my view, patently clear from a reading of the letters sent to Mathebula that not only was the respondent aggressive and

³ My emphasis.

⁴ Footnotes omitted.

sarcastic towards Mathebula but that her conduct bordered on being abusive towards Mathebula. I am therefore of the view that the evidence in respect of charge 1.1 is simply overwhelming. The respondent goes as far as to accuse Mathebula of suffering from “selective amnesia” and accuses Mathebula of being “very silly”. See in this regard the following extracts from a few letters written to Mathebula. The contents of these letters speak for themselves:

In a letter dated 30 November 2004, the respondent, *inter alia*, wrote the following:

“RE: UNCERTAINTY ABOUT ACTING AND OTHER ISSUES AT THE LIBRARY.

After much consideration about the meeting scheduled for the 23/06/05 I have come to a conclusion that I will not participate in these type of meetings for the following reasons:

- i. It is apparent from how you handle these matters that you have no regard or no knowledge of the grievance procedure, which this organization clearly subscribes to.
- ii. I have also become tired of presenting myself in front of what I perceive to be a Kangaroo court where the outcomes of these meetings have no value to me.
- iii. It is my view that you are also part of the bigger problem and therefore cannot play any constructive and objective role in resolving the alleged problems.

.....

In conclusion I am not going to respond to any allegations of a grievances set before me including Ms. Wheeler’s grievance. I therefore call upon you to charge me with any misconduct if you deem it fit and I will defend my actions in a proper forum. “

In a letter dated 30 November 2004 the following was written:

“RE: LEAVE FORMS AND ATTENDANCE REGISTER

Your minute dated 30/11/04 (12:05) has reference.

I am going to respond to your minute issues but let me start by saying that I really find your approach to issues, petty, reactionary and irritating and above all nothing stops you from talking to me.

Secondly I think you have selective amnesia by that I mean you forget how often behave as a result one avoids to you in that I do. If you read your letters you will see that I have indicated that I have problems with the way you Communicate (loosing temper etc).

....

LEAVE FORMS

How do you know which days I was at work because I do not report to your office?

Shirley you have copies of my medical certificates what more do you want from me.

(I can not provide you with all of them at the moment unfortunately you would have to wait). Is this council policy by the way? If so please furnish me with the copy.

ATTENDANCE OF MEETING

I attend meetings when its possible, are you not content with the fact that if I am unable to attend I send someone. Why is it a problem because I do send somebody. I do not need you to remind me what time council starts and I find this comment very silly and a personal attack to my intelligence. I will send apologies through whoever I choose, given my working conditions whether you accept them or not is your problem. To remind you, you started talking to me through my junior staff in March. I find it interesting that it bothers now when it happens to you. I find your comment about the 11th November 2004 extremely irrelevant to the issues on this letter the purpose puzzles me it would seem as if you are trying to defend yourself against something or making a point. “

In a letter of 18 May 2005 the following is written:

“RE: MEETINGS AND COMMUNICATION PROBLEMS

I would like to raise a concern at the manner meetings are communicated may I emphasise that I am raising this issue for the second time. Firstly, I object to being sent a message with an sms on Saturday to let me know that I have to attend a meeting on Monday and whatever documentation will be made available to me on Monday morning. This creates problems as one goes to meetings less prepared.

Please note that we need to be reasonable in how we communicate engagements even the manner we choose remains important. In this case I would recommend that we use official ways of communicating. (I do not believe an sms is one of them) Secondly please note that reasonably we all have diaries that we operate from and communicating dates within reasonable times will assist all of us in carrying out our duties diligently.

I do note however that some situations may be out of your control but the decency to call and explain is a minimum that one will expect. Talking via your secretary also creates many problems I do not know why we have this arrangement and this often clouds issues as she often behaves as a Director. I believe this needs to be corrected. “

[16] The arbitrator’s finding in this regard is unreasonable and completely unconnected with the documentary and oral evidence presented at the arbitration hearing. I am also, in light of these letters and in light of the evidence of Mathebula regarding these letters, of the view that they on their own constitute a ground for dismissal.

Charge 1.3

- [17] It is clear from the documentary evidence that the respondent had failed to properly populate her performance agreements and that she in fact refused to submit the performance agreements. She failed to comply with a lawful instruction to submit properly populated performance agreements for various years (charge 1.3).

Charge 1.4

- [18] In respect of charge 1.4 I am persuaded that the arbitrator's findings in respect of this charge are unreasonable. The documentary evidence before the arbitration clearly established that the respondent had failed to establish the Mogale City Support Sport Council despite direct and lawful instructions to do so (1.4). The arbitrator held that the respondent was not responsible for the establishment of the Sport Council because an independent company Pro-Active Management was appointed by the Provincial Department of Sport to establish the Sport Council. It is from the documentary evidence, clear that this was not the case. Pro-Active Management was merely established to assist the Municipalities to establish the Sport Council. It was the instruction to the respondent to facilitate the process.

Leave to appeal

- [19] The respondent has applied for leave to appeal. I will continue to refer to the parties in their respective capacities before the review court.
- [20] I have perused the grounds for leave to appeal as set out in the notice of application for leave to appeal. In respect of appeal ground 1.1, I find that there is no merit in this ground. No evidence of what led to the breakdown in the relationship between the respondent and Mathebula was raised during the arbitration hearings. What is important in the review was whether the arbitrator arrived on the totality of the evidence to a reasonable conclusion. I have already pointed out in what respects I am of the view that the arbitration award was in respect of many of the findings unreasonable. The appeal ground raised as appeal ground 2 is nonsensical. It is patently clear that the respondent did not properly populate her performance agreement. In respect of appeal grounds 3, 4, 5, 6, 7 and 8 I find that they lack merit.

[21] It is trite that an applicant in an application for leave to appeal must, in order to be entitled to leave to appeal, demonstrate to this Court that there is a “*reasonable prospect that another court could come to a different conclusion*”.⁵ I have considered the respondent’s grounds as set out in its application for leave to appeal and I am satisfied that there are no prospects of success on appeal. A mere attack on the judgment and the reasoning of the *court a quo*’s decision also is no justification for an entitlement to leave to appeal.

Order

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

22.1 The application for leave to appeal is dismissed.

22.2 There is no order as to costs.

AC Basson
Judge of the Labour Court of South Africa

⁵ See *Woolworths Ltd v Matthews* [1999] 3 BLLR 288 (LC).