



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 1071/11

In the matter between:

SEENATSO RIBA

Applicant

And

COMMISSIONER SAMUEL KHAKHATI NEGOTA

First Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

SOUTH AFRICAN SOCIAL SECURITY AGENCY

(SASSA)

Third Respondent

Heard: 13 August 2014

Delivered: 27 February 2015

Summary: The commissioner's decision that the applicant's dismissal was substantively and procedurally fair is not rendered unreasonable by the commissioner's errors which have no effect on the reasonableness of the award.

JUDGMENT

LALLIE J

Introduction

- [1] In this application the applicant seeks an order reviewing and setting aside an arbitration award of the first respondent (“the Commissioner”). The applicant was employed by the third respondent as a Senior Manager for the Sekhukhune District at Polokwane in Limpopo. Subsequent to allegations of misconduct, the third respondent instituted a disciplinary enquiry against the applicant. He was found guilty of 29 charges of breach of policy, gross dereliction of duty and misrepresentation and dismissed. He referred an unfair dismissal dispute to the second respondent (“the CCMA”), where the Commissioner had to determine the fairness of his dismissal for category one and two charges which stemmed from two interviews which took place at the third respondent’s Polokwane office in Limpopo. The Commissioner found his dismissal both substantively and procedurally fair. It is the Commissioner’s decision that forms the subject matter of this application.

The award

- [2] The facts of the matter before the Commissioner were that the applicant was appointed by the third respondent as a Senior Manager for the Sekhukhune District. His duties included recruitment. He therefore, was a member of panels which interviewed candidates for positions which needed to be filled. Sometimes he was the chairperson of those panels. He was made aware of the third respondent’s recruitment, selection and appointment policy (“the policy”) whose main purpose was to ensure uniform governance. The misconduct which led to the applicant’s dismissal was mainly that contrary to the policy, instead of recommending candidates pursuant to interviews for two positions for which the applicant was the chair-person, a decision was reached that any of the candidates from 1-8 for one position and from one to ten for another, were eligible for appointment. The policy required the interview panel which was chaired by the applicant to give reasons for regarding a particular candidate suitable for appointment to a particular post. The panel had to recommend a candidate. In addition, reasons had to be

given for finding the other candidates unsuitable. The applicant's failure to comply with the policy afforded the appointing authority an opportunity to select candidates arbitrarily and open the third respondent to the risk of being sued by candidates who were victims of the applicant's failure to comply with the policy. The Commissioner found that the applicant knew the policy which the applicant conceded to have possibly overlooked. He acknowledged the absence of a specific recommendation both in the applicant's and the joint panel recommendations. He rejected the applicant's defence of victimisation and inconsistency for being singled out for discipline. He accepted the third respondent's evidence that other members of the panel were also disciplined and issued with appropriate sanctions which were, for valid reasons less than dismissal. The Commissioner found the sanction of dismissal appropriate and concluded that the applicant's dismissal was both substantively and procedurally fair.

Grounds for review

- [4] The applicant submitted that the arbitration award stands to be reviewed and set aside because he was dismissed not for misconduct he had committed on his own but misconduct of members of the interview panel. He was the only member of the panel selected for discipline for the incidents which took place at the Sekhukhune district and found the explanation proffered by the third respondent that other panel members were also going to be charged untrue. He alleged that the chairperson of the interviews which took place at Waterberg who committed similar misconduct was not charged. So were other members of his panel. He submitted that the Commissioner committed a gross irregularity by failing to have due regard for all the material evidence and factors properly before him which included his closing arguments which he filed on time. Another attack on the award, is based on the Commissioner's bias against the applicant which manifested itself in his disregard for evidence tendered by the applicant while attaching undue weight to uncorroborated evidence of the third respondent. The decision that the applicant's dismissal was substantively and procedurally fair resulted from the Commissioner's gross irregularity of focusing more on secondary rather than primary issues.

The applicant also attacked the Commissioner's decision to reopen the third respondent's case and submitted that the record was materially unhelpful and asked that it be disregarded.

- [5] Opposing the application, the third respondent denied having acted inconsistently and submitted that disciplinary action was taken against members of the panel according to the different roles they played in the selection process. Some owned up and showed remorse thus restoring the relationship of trust between themselves and the third respondent. The third respondent explained that the delay in taking disciplinary action against the applicant and other affected employees was due to budget constraints and the time it required to investigate misconduct against each implicated member of the panel. It denied that the Commissioner committed gross irregularities and submitted that the Commissioner correctly found that the applicant demonstrated his knowledge of the policy and chose to ignore implementing it although he was an experienced senior manager in whom the third respondent had invested trust.
- [6] I have considered the arguments by the applicant and on behalf of the third respondent against the background of the test for review that the Commissioner's decision is one which a reasonable decision-maker could not reach in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. Enunciating the test the court held that it is a stringent one that will ensure that awards are not lightly interfered with. In this regard see *Fidelity Cash Management Services v CCMA Others*². When determining review applications, this court is required to ascertain whether the arbitrator considered the principal issue before him or her, evaluated the facts and come to a reasonable decision. In this regard see *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*³.
- [7] I have perused the reconstructed record which is signed by the parties including the applicant himself. It does not support the applicant's contention

¹ 2008 (2) SA 24 (CC)

² (2008) 29 ILJ 964 (LAC)

³ [2014] 1 BLLR 20 (LAC) at para 16

that it is not helpful and needs to be disregarded. On the contrary, I found it helpful and could find no reason to disregard it. I have taken into account the applicant's submission that the manner in which the Commissioner dealt with evidence and the weight he attached thereto rendered his award reviewable. Errors committed by Commissioners during arbitrations as well as the weight they attach to evidence, do not necessarily make their awards susceptible to review. It is only when they cause the Commissioner's decisions to be unreasonable that they can constitute valid grounds for review. In this regard see *Heroldt v Nedbank Ltd and Another*⁴. The Commissioner's failure to mention the applicant's closing arguments in his award is not necessarily an indication of his failure to consider them. He was required in section 138(7) of the Labour Relations Act of 1995 ("the LRA") to give brief reasons for his decision and I am satisfied that he did. The power to determine the fairness or otherwise of a dismissal is vested on Commissioners by section 138 of the LRA. The question whether, the Commissioner has reached a decision this court does not agree with, does not form part of the test for review.

[8] The applicant's submissions on inconsistency do not help him. The third respondent explained that he was not singled out and gave valid reasons for treating him differently from other panel members who also played a role in the misconduct which led to his dismissal. Seniority as well as acknowledging wrong doing and showing remorse play a vital role in the manner in which an employer deals with employees who have committed the same or similar misconduct. When the evidence before the Commissioner is considered in its totality it shows that he dealt with the issue before him, considered the evidence and reached a reasonable decision which is not susceptible to review.

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

⁴ [2013] 11 BLLR 1074 (SCA).

9.1 The application for review is dismissed.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Riba In person

For the Respondent: Advocate Modjadji

Instructed by : The State Attorney

LABOUR COURT