



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT, JOHANNESBURG

JUDGMENT

Case no: JR2772-12

Not Reportable

In the matter between -

NATIONAL UNION OF MINE WORKERS

First Applicant

MOTSHABALEKGOSI MOFFAT

Second Applicant

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER NKOSI

SIZWE JOSEPH N.O

Second Respondent

MINTEK

Third Respondent

Heard: 20 November 2014

Delivered: 19 March 2015

Summary: Review application. Unfair labour practice. Failure to employ retrenched employees in terms of the collective agreement.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the second respondent (“the Commissioner”) under case number GAJB14178-12 dated 29 October 2012, in terms of which it was determined that the third respondent did not commit an unfair labour practice. It was for this reason that second applicant’s claim was dismissed.

Background facts

- [2] The dispute which the applicants referred to the first respondent arose from the allegation that the third respondent failed to comply with the retrenchment agreement concluded by the parties before the dismissal of the second respondent. The dispute relates to the alleged unfair labour practice in terms of which it was alleged that third respondent failed to employ the second respondent after a vacancies became available subsequent to his retrenchment.
- [3] The unfair labour practice claim was based on the provisions of clause 2.5 (which is hereafter referred to as the “recall clause”) of the settlement agreement which reads as follows:

“ Should there exist the same, similar or suitable vacancies within Mintek in the period of at least 12 months from the date of their employment termination Mintek shall recall those employees who were casuals [sic] of retrenchment. Fair recall procedure shall apply. Shop

stewards shall be informed and observe the fairness of the process and shall further take part in tracing former employees”.

- [4] The retrenchment of the affected 38 employees took place on 31 January 2011. A year later the third respondent in seeking to fill in the 20 vacancies that had arisen invited the retrenched employees to indicate if they would wish to be reemployed. A total of 37 retrenched employees applied for those vacant posts. The second applicant applied for the positions of operator, storeman, principal operator, chief operator and junior operator.
- [5] The case of the third respondent is that in launching the process of reemploying the retrenched employees in the 20 posts it contacted them through and with the assistance of the shop-stewards. In processing the appointment of the retrenched employees for the 20 posts the third respondent conducted interviews and in selecting those who would fill in the vacant posts applied the following criteria:
- (a) Past performance rating.
 - (b) Education level for chief operating officer- matric being a minimum requirement.
 - (c) Interview scores in the event of equal performance rating
- [6] The primary criteria for selection of the 20 was according to the third respondent consideration of the rate of past performance. Those of the retrenched employees who achieved the top score from their previous performance were selected for reemployment. The second applicant was according to the third respondent not selected because he scored 3.1 in his past performance and that placed him at 27 in the ranking. It was for this reason that the second applicant was not reemployed.
- [7] The second applicant was unhappy with the outcome of the selection for reemployment of the retrenched employees and accordingly complained that his non-reemployment constituted an unfair labour practice. The dispute was arbitrated after the failure of the conciliation.

The grounds of review

- [8] The applicant contends that the arbitration award is reviewable because the Commissioner failed:
- a. To conduct himself in the same manner as a reasonable decision maker could have.
 - b. To import law into his conclusion
 - c. To apply the legal principles alternatively misconstrued the case by following irrelevant case law.
- [9] The applicant further argued that the Commissioner was biased and unreasonable.

Evaluation

- [10] The test to apply in considering a review application is whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach?¹ In relation to gross irregularity or misconduct the approach to adopt is set out in *Gold Fields South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*,² in the following terms:

“The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.”

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007) 28 ILJ 2405 (CC).

²

- [11] The principal issue which was before the Commissioner in this matter is whether the third respondent committed an unfair labour practice in not employing the individual applicant after embarking on the recalling process in terms of clause 2.5 of the retrenchment agreement. Considering all the evidence and the materials that properly served before the Commissioner, I am of the view that the conclusion that the third respondent did not commit an unfair labor practice is in line with the constitutional standard of reasonableness.
- [12] In compliance with the provisions of clause 2.5 of the retrenchment agreement the third respondent with the assistance of the shop steward invited the retrenched employees to indicate if they wished to be re-employment. The number of employees who indicated their wish to be reemployment was more than the 20 positions which needed to be filled. The retrenchment agreement does not provide the criteria to use in the event where the vacant positions are less than the number of the employees who wished to be reemployed. In seeking to ensure that the selection was fair the third respondent introduced the criteria for the purposes of selecting the 20 people from the over 30 who had expressed an interest in being reemployed.
- [13] As stated the main selection criteria used were previous performance rating. There is no evidence on the record showing that the applicant challenged the veracity of those selection criteria. The applicants have also not challenged the rating of his performance score. In the absence of that challenge, there is no basis for attacking the conclusion reached by the Commissioner that no unfair labour practice was committed by the respondent.
- [14] The applicants raised another grounds of review in the supplementary affidavit. In my view none of those grounds takes the case of the applicant any further in relation to showing that the decision reached by the Commissioner was unreasonable or that the Commissioner committed gross irregularity or misconduct himself in the manner in which he conducted the arbitration proceedings.
- [15] The issue of interpretation and application of the retrenchment agreement in terms of section 24 of the Labour Relations Act of 1995

was never raised as an issue for consideration during the arbitration hearing. It therefore follows that there is no basis on that ground to interfere with the arbitration award.

- [16] The same applies to the issue of jurisdiction relating to the provisions of section 187 of the LRA. The applicants contend that in this regard that the CCMA did not have jurisdiction to entertain the matter because the second applicant had stated that he was left out because of being a shop steward. Whilst it is clear that the reference was made during the arbitration hearing to the issue of discrimination, this was however never pursued by the applicant. In fact the respondent's representative invited the applicants to indicate and clarify whether they wished to pursue the issue of discrimination during the arbitration hearing. In response the applicants stated that the issue of discrimination was used loosely. There is thus no evidence on the record that would support the proposition that the dispute ought to have been categorized as falling within the provisions of section 187 of the LRA. The criticism against the Commissioner that he failed to consider the issue of jurisdiction in relation to discrimination accordingly bears no merits.
- [17] The other point raised by the applicant is that the Commissioner failed to investigate the possibility of the existence of future vacancies. This was again not a matter which the Commissioner was called upon to consider and there is no evidence pointing in that direction. Accordingly that ground of review is unsustainable.
- [18] The case which the applicant sought to make out required him to produce evidence to show that in implementing the recall clause the third respondent refused and or failed to reemploy him in the manner that contravened the provisions of clause 2.5 of the retrenchment agreement.
- [19] The other issue that arose in this matter had to do with the fourth affidavit which the third respondent introduced. Whilst I appreciate the basis for introducing the fourth affidavit, it does not however have any bearing on the review itself. It was for this reason that I also found that its introduction did not attract costs.

[20] In light of the above I am of the view that the applicants have failed to make out a case for review.

Order

[21] In the premises the applicant's application to review and set aside the arbitration made under case number GAJB14178-12 dated 29 October 2012, is dismissed with no order as to costs.

E MOLAHLEHI

Judge of the Labour Court Johannesburg

Appearances:

For the Applicant: Union Official

For the Respondent: Brett Abrahams of Webber Wentzel