



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1265/13

In the matter between:

SOUTH AFRICAN REVENUE SERVICES

Applicant

and

PUBLIC SERVANTS ASSOCIATION OF

SOUTH AFRICA obo R MOORCRFT

AND ANOTHER

First Respondent

COMMISSIONER THEMBEKILE

NSABANYONI N O

Second Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

Heard: 29 April 2015

Delivered: 26 May 2015

Summary: Review. Applicant failing to establish that arbitration award reviewable. Application dismissed with costs

JUDGMENT

GUSH J

- [1] The applicant in this matter is the South African revenue services, the erstwhile employer of the first respondent's members, Rene Moorcroft and Faraana Farred. (Hereafter referred to as the "employees")
- [2] This is an application by the applicant to review and set aside the award handed down by the second respondent in which award, the second respondent concluded that the dismissal by the applicant of the employees was both procedurally and substantively unfair and ordered that the applicant reinstates the employees retrospectively without loss of benefits and in addition ordered that the employees be paid back pay amounting to six months each.
- [3] The order that the applicant seeks is for the award issued by the second respondent to be reviewed and set aside and substituted with an order that the employees' dismissal was procedurally and substantively fair.
- [4] The background facts relating to this matter are largely set out in the applicant's founding affidavit. The background is as follows:
 - a. the employees had been employed by the applicant as debt collectors for 10 and 11 years respectively prior to their dismissal;
 - b. during May 2013, Moorcroft drafted and printed a letter confirming that Farred's brother, Riedwaan, had been employed by the applicant on a temporary basis from 1 October 2002 to 28 February 2006. Moorcroft showed the letter to her colleague Faraana Farred who told Moorcroft to destroy it as she was not on good terms with her brother. Moorcroft's evidence was that she had torn it up ;
 - c. shortly after the letter had been drafted and printed, an employee of the applicant, however, found a printed copy of the letter in the printer and handed it to a senior executive of the applicant; (it is common cause that the letter drafted by Moorcroft was never sent to Riedwaan and

taking into account the evidence, it is probable that on the insistence of Farred, Moorcroft had torn up the letter she had shown to her);

- d. the matter was referred to the applicant's "Employment Relations". The applicant's Human Resources Consultant, Maphotho, convened a meeting with the employees in May 2012. At this meeting, Moorcroft admitted drafting the letter. Maphotho advised the employees that they did not have the authority to draft the letter nor confirm employment on behalf of the applicant. The applicant records that the employees "were warned not to repeat the conduct and they were informed that the matter will be referred to employment relations for further investigation".¹
- e. on 12 July 2012, the employees were charged with misconduct and issued with notices of a disciplinary hearing. (There is no cogent explanation why the employees were only charged with misconduct some two months later given the fact that they had admitted having drafted the letter.) The charges of misconduct were as follows:
 - i. Moorcroft:

COUNT ONE: confirmation of appointment without authorisation

it is alleged by SARS, that you, Ms Rene Moorcroft, is guilty of the above charge

in that on or about 18 may 2012 and at or near Megawatt Park, you being a person upon whom a power has been conferred and/or who has been charged with a duty by virtue of holding a post or employment, to wit: South African Revenue Service: Debt Management, Megawatt Park, **Dishonesty.** (sic) (my emphasis)

COUNT TWO: refused to obey SARS processes

it is alleged by SARS, that you, Ms Rene Moorcroft, is guilty of the above charge

¹ Founding affidavit para 17 page 8.

on or about 18 May 2012 and at or near megawatt Park you being a person upon whom a power has been conferred and/or who has been charged with a duty by virtue of holding a post or employment, to wit: South African Revenue Service: Debt Management, Megawatt Park, prejudice of administrative efficiency and effectiveness of SARS. (sic) (my emphasis)

ii. Farred

COUNT ONE: confirmation of appointment without authorisation

it is alleged by SARS, that you, Ms Faraana Farred, is guilty of the above charge

in that on or about 18 may 2012 and at or near Megawatt Park, you being a person upon whom a power has been conferred and/or who has been charged with a duty by virtue of holding a post or employment, to wit: South African Revenue Service: Debt Management, Megawatt Park, **Dishonesty**. (sic) (my emphasis)

COUNT TWO: refused to obey SARS processes

it is alleged by SARS, that you, Ms Faraana Farred, is guilty of the above charge

on or about 18 May 2012 and at or near megawatt Park you being a person upon whom a power has been conferred and/or who has been charged with a duty by virtue of holding a post or employment, to wit: South African Revenue Service: Debt Management, Megawatt Park, prejudice of administrative efficiency and effectiveness of SARS. (sic) (my emphasis)

- [5] The chairperson of the enquiry found both the employees guilty of both counts of alleged misconduct: dishonesty and prejudice of administrative efficiency and effectiveness of SARS. The chairperson came to the conclusion that on the combination of the charges, dismissal was the appropriate sanction on the basis that the trust relationship was “really destroyed”.

- [6] Dissatisfied with their dismissal, the employees referred a dispute to the third respondent who in turn appointed the second respondent to arbitrate the dispute.
- [7] During the arbitration, it became clear from the evidence of the applicant's witnesses that Faraana Farred's brother had in fact been employed at SARS temporarily but that the brother had been placed at SARS by a temporary employment agency.
- [8] At the conclusion of the arbitration, the second respondent issued an arbitration award in which he found that the dismissal of the employees was both procedurally and substantively unfair and ordered their retrospective reinstatement.
- [9] It is this award that the applicant seeks to review and have it set aside.
- [10] The applicant's grounds of review are that the second respondent **erred**: in finding that the dismissal was procedurally and substantively unfair; **erred** in finding that Riedwaan had been placed at SARS by the temporary employment agency; and **erred** in finding that the warning issued at the meeting of 22 May constituted a warning and that no further disciplinary action was required. As an afterthought, the applicant in the alternative averred that the second respondent did not properly apply his mind to the issues and that "there is no rational and/or reasonable correspondence between the evidence before the Commissioner and the eventual findings ..."
- [11] Applying the test on review as set out in *Sidumo and Another v Rustenburg Platinum Mines and Others* 2008 (2) SA 24 (CC), *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) and the *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC matters, it is difficult to comprehend on what basis or on what grounds the applicant regards the award as reviewable.
- [12] What is abundantly clear is that the so-called grounds of review related to the second respondent having erred are not more than grounds of appeal as opposed to grounds of review.

[13] The basis and the essence of the applicant's decision to terminate the employees' employment was a finding that they were guilty of both dishonesty and the ubiquitous "prejudice of administrative efficiency and effectiveness of SARS". There was no evidence adduced at the arbitration that dealt with the alleged "prejudice to the administrative efficiency and effectiveness of SARS" and the evidence clearly failed to establish that the employees were dishonest.

[14] A consideration of the record suggests not only that the second respondent's conclusion that the dismissal was substantively unfair but that his conclusion that the applicant had not established dishonesty is not only correct but not reviewable. The second respondent records his reasoning in this regard in his award:

'What cannot be disputed is the fact that Riedwaan was placed at SARS for over four years by his employment agent. This therefore means that the applicants worked with Riedwaan for a period of time and could easier believe that he was a SARS employee.'²

[15] Likewise, it is difficult to gainsay the second respondent's conclusions regarding the meeting in May where by the applicant own admission the employees were warned not to repeat their conduct. This together with the employees length of service understandably and reasonable led the second respondent to conclude that "the dismissal sanction was unwarranted"

[16] Careful consideration of both the transcript of the arbitration and the award of the second respondent, it is abundantly clear that the conclusion of the second respondent cannot be said to be one that a reasonable decision-maker could not have reached in light of the evidence and the issues he was called upon to decide.

[17] For the reasons set out above, I am satisfied that the applicant has failed to establish that the award of the second respondent is reviewable. As far as costs are concerned, there is no reason in law or in fairness why costs should not follow the result.

² Award at para 5.3 page 18.

[18] In the circumstances, I make the following order:

- a. the applicant's application is dismissed with costs.

D H Gush

Judge of the Labour Court of South
Africa Johannesburg

APPEARANCES:

FOR THE APPLICANT: H Schensema; Routledge Modise Inc

FOR THE RESPONDENT: T Ntshebe; Thabang Ntshebe Attorneys