



IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR2609/12

In the matter between:

CYNTHIA SITHOLE

Applicant

And

MS JOYCE NKOPANE

First Respondent

**SAFETY AND SECURITY SECTORAL BARGAINING
COUNCIL**

Second Respondent

MINISTER OF SAFETY AND SECURITY

Third Respondent

**COMMISSION OF POLICE SERVICE: COMMISSIONER
OF POLICE**

Fourth Respondent

Heard: 05 November 2014

Delivered: 02 July 2015

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

- [1] In this review the Applicant seeks an order reviewing and setting aside an arbitration award of the First Respondent (*“Arbitrator”*) dated the 26th of September 2012 wherein she found the dismissal of the Applicant substantively fair.
- [2] This application is opposed by the Third and Fourth Respondents.

Factual background

- [3] The Applicant was employed by the Fourth Respondent as a Senior Data Analyst. She was summoned to appear before a disciplinary hearing to answer to the following charges:
- 3.1 On the first charge, the Applicant allegedly failed to comply with or contravened an Act, Regulation or legal obligation by failing to lock the office which led to the new State computer screen and mouse being stolen due to her omission and/or negligence on the 12th of November 2008 at SAPS Mamelodi East.
- 3.2 On the second charge 2, the Applicant allegedly prejudiced the administration, discipline and efficiency of the Department office or institution of the State by failing to lock the office which led to the new State computer screen and mouse being stolen out of the office due to her omission and/or negligence on the 12th of November 2008 at SAPS Mamelodi.
- 3.3 On the third charge, the Applicant allegedly contravened a prescribed code of conduct for the service or police service which may be applicable to her by failing to lock the office which led to the new State computer screen and mouse being stolen out of her office due to her omission and/or negligence of duty on the 12th of November 2008 at SAPS Mamelodi East.

3.4 On the fourth charge, the Applicant allegedly committed a common law or statutory offence by being directly or indirectly involved as an accomplice to theft of new State computer and Mouse with Sergeant Hlongwane on the 12th of November 2008 at Mamelodi East.

- [4] On the 28th of September 2009, the Applicant was found guilty of all the charges and a sanction of dismissal was accordingly recommended. The Applicant immediately lodged an appeal challenging the finding of guilty and sanction of dismissal. However, the appeal authority, Lieutenant Colonel H C Oosthuizen, decided not to proceed with the appeal due to the state of the record of the disciplinary hearing which was not only incomplete but confounding. The Applicant was accordingly advised to avail herself to the machinery of the LRA.
- [5] Indeed the Applicant referred a dispute of unfair dismissal to the Second Respondent. The conciliation was unsuccessful and the matter proceeded immediately to arbitration.
- [6] There were two issues in dispute before the Arbitrator. Firstly, the Applicant was challenging the appropriateness of the sanction of dismissal. Secondly, the Applicant also took issue with the manner in which the Fourth Respondent dealt with her appeal.
- [7] I must hast to mention that at the commencement of the arbitration proceedings the parties agreed not to lead oral evidence but to deal with the matter on the basis of their written heads of argument. What is also worth emphasising at this stage is that it is common cause that the Applicant did not challenge the finding of guilt in terms of all charges, particularly the charge of theft.
- [8] Notwithstanding the above, in her written submissions before the Arbitrator, the Applicant sought to traverse the chairperson's findings on all four charges. She argued that the Arbitrator failed to deal with the splitting of charges in respect of charges 1 to 3 which did not attract a sanction of dismissal, in any event. On charge 4, a charge theft, the Applicant argued that the presiding officer did not understand the elements of theft as he constantly referred to her negligence as oppose to intention in his findings.

- [9] On procedure, the Applicant argued that it was an impermissible of the appeal authority not to consider the appeal in terms of Regulation 17 of the SAPS Disciplinary Regulations.
- [10] On the other hand, the Fourth Respondent argued that since the Applicant had been found guilty of a serious misconduct of theft, the trust relationship is irrevocably damaged. To further exacerbate the situation, the Applicant was also found guilty of the same criminal offence in a criminal court and was sentenced to a suspended sentence of 3 years.

General grounds of review

- [11] The Applicant relies on the following grounds of review in these proceedings:

11.1 The Arbitrator's award is not justifiable in relation to the reasons given for it having no regard to evidence presented before her. Alternatively, there is no rational connection between the material placed before her and the ultimate conclusion reached by her.

11.2 The Arbitrator failed to apply her mind to the evidence presented to her at arbitration in reaching her conclusion that the Applicant's dismissal was substantively unfair.

11.3 The First Respondent committed a gross irregularity by failing to apply her mind to the evidence, misunderstood the evidence and attributed motives to the Applicant which could not reasonably be drawn from the evidence submitted.

11.4 The First Respondent committed misconduct in relation to her duties as an arbitrator due to the reasons advanced hereunder:

11.4.1 She disregarded relevant evidence.

11.4.2 She issued an award that indicated that she failed to apply her mind to the facts presented.

11.4.3 She submitted an award that is so unreasonable that no reasonable arbitrator could have made.

11.4.4 The Applicant proved on the balance of probabilities at the proceedings that her dismissal was unfair and for unfair reasons.

Legal principles

[12] The position regarding the review of arbitration awards was succinctly postulated in *Herholdt v Nedbank Ltd*¹ where the Supreme Court of Appeal stated that:

“A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

[13] It stands to reason, therefore, that this Court is not asked to decide whether or not the Arbitrator erred in her findings but only to test reasonableness thereof.

Application

[14] I deal first with the issue of appropriateness of the sanction of dismissal. Clearly, the Applicant persisted with same line of argument she had adopted during the arbitration proceedings despite her election not to challenge the presiding officer's guilty verdict on all charges.

[15] Having consented to the process that the Arbitrator adopted and elected only to challenge the sanction of dismissal, it did not avail the Applicant to argue that

¹ [2013] 34 ILJ 2795 (SCA) at para 25.

the presiding officer did not understand the elements of the offence of theft. Whether or not the Arbitrator's finding of guilt on a charge of theft is incorrect is inconsequential since the Applicant was bound by her election not to challenge that finding.

- [16] On the appropriateness of the sanction of dismissal, I note that the Applicant did not challenge the Fourth Respondent's submission that theft is a serious offence and has an element of dishonesty. The Arbitrator accordingly found that the Applicant's conduct in stealing the computer screen and the mouse undermined the trust relationship and a lesser sanction than dismissal would have an effect of setting a bad precedent and undermining discipline within the Third Respondent's organisation. I find nothing unreasonable with that conclusion.
- [17] On the issue of the appeal authority's decision not to consider the appeal, I concur with the Arbitrator that there is nothing untoward with that decision. Strangely enough, the Applicant is not challenging the procedure that led to her dismissal. It is my view, therefore, that the challenge on appeal outcome is misconceived since the Applicant deliberately shunned an opportunity to be heard *de novo* during the arbitration proceedings.
- [18] Clearly, the Applicant was represented by her attorneys of record even during the arbitration proceedings and as such, she could not have misunderstood the nature of arbitration proceedings. Also, judging from the long list of the unadorned grounds of review upon which this application is predicated, the Applicant is injudicious in launching this application.

Conclusion

- [19] It is my view that the Arbitrator clearly understood the nature of the inquiry and arrived at a reasonable result. I find no reason to interfere with the arbitration award.
- [20] On costs, there is no reason why cost should not follow result.

Order

[21] In the circumstances, the application is dismissed with costs.

Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

FOR THE APPLICANT:

JM Gouws

Attorneys?

FOR THE THIRD AND

FOURTH RESPONDENTS:

Adv Kgotla ?