



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 2681/2012

POPCRU obo SGT TS GWANGWA

Applicant

And

MAREE N O SSSBC

First Respondent

MINISTER OF POLICE

Second Respondent

Heard: 29 July 2015

Delivered: 30 July 2015

JUDGMENT

GUSH J

[1] This is an application to review and set aside an award made by the 1st respondent in terms of which award the 1st respondent concluded that the applicant was fairly dismissed but that the procedure followed by the 3rd respondent was unfair.

[2] The 1st respondent ordered the 3rd respondent to pay the applicant compensation in an amount equivalent to one month's salary namely R9959.50.

- [3] The applicant was prior to his dismissal on 13 January 2011 employed by the 3rd respondent as a police sergeant.
- [4] The incident that led to the applicant's dismissal occurred on 21 April 2010. The applicant together with a colleague detained a member of the public "Jimmy Mvungalo", a Tanzanian businessman resident in South Africa for approximately 9 years.
- [5] The applicant had attempted to stop Jimmy who was driving his motor vehicle in Pretoria. The applicant averred that he recognised Jimmy as being a drug dealer. As the applicant was in an unmarked car Jimmy did not stop but proceeded to the Sunnyside police station where according to him he was dragged from his motor vehicle and taken into the police station. Jimmy avers that he was assaulted by inter alia the applicant and kicked him whilst in the cells. The applicant testified that he "grabbed the suspect's hand and walked him into the police station straight to the cells where he was searched for drugs. No drugs were found.
- [6] The applicant later took Jimmy to his house where his wife noticed that he Jimmy had been assaulted. There are allegations made by Jimmy that the applicant had taken money from him an allegation denied by the applicant.
- [7] As a result of this incident the applicant was charged as follows:
- in terms of section 40 of the South African police service act 1995 (act number 68 of 1995) read with the South African police service discipline regulations 2006 you are hereby charged with misconduct in that you allegedly contravened regulation 20 (D) the said regulation that near Pretoria on 21 April 2010 during plus -21 H00 whilst on duty conducted yourself in an improper disgraceful and unacceptable manner by assaulting Mr Jimmy with your hands for no apparent reason.
- [8] Following a disciplinary enquiry the applicant was found guilty of this misconduct and his services were terminated. Dissatisfied, the applicant referred a dispute regarding his dismissal to the 2nd respondent who in turn appointed the 1st respondent to conduct the arbitration.

- [9] The applicant filed a founding affidavit followed by the record and a rule 7A (8) affidavit in which he elected to abide by his founding affidavit. For reasons which the applicants attorney was unable to explain it was no attempt made whatsoever to file the substantial bundle of documents presented to the 1st respondent at the arbitration.
- [10] Insofar as it is possible to comprehend the applicants grounds of appeal as set out in his founding affidavit it would appear that the applicant relies on an averment that the 1st respondent committed misconduct by concluding that he had been substantively fairly dismissed albeit that the 3rd respondents procedure was unfair.
- [11] In dealing with what the applicant referred to as “reasons for review” the so-called reasons are prefixed by a reference to the award. In the majority of cases it is impossible to determine what the link is between the paragraph in the award referred to and the so-called reason enumerated in the founding affidavit.
- [12] The matter was stood down to enable the applicant’s attorney to remedy this and later despite his assurance that he had resolved this issue was unable to explain the references or the grounds of review.
- [13] As far as it is possible to understand the applicant’s grounds the applicant appeared to rely on an averment that the 1st respondent misconducted himself when he concluded that, after a thorough analysis of the evidence,
- I accept on a balance of probabilities the evidence presented on behalf of the respondent that the applicant assaulted Mr Mvugalo with his hands and thus acted in an improper disgraceful and unacceptable manner.
- [14] The 1st respondent’s conclusion was that the dismissal was substantively fair.
- [15] As far as the procedure is concerned the 1st respondent having considered the argument of the applicants and the evidence of the chairperson of the disciplinary enquiry into the following logical and reasonable conclusion:

in determining procedural fairness one has to have regard to the disciplinary regulations of the respondent, schedule 8 of the LRA and the

guiding principles laid down by the above case law. The essence of procedural fairness has a right to be heard as entrenched in the rules of natural justice and particularly in the Audi alteram principle which includes a right to challenge evidence. There is not one iota of evidence to show that the applicant had been denied this. However, I do accept that the respondent had failed to follow its own procedures regarding timeframe. This however did not render the rest the procedure unfair and especially did not impact on the basic right to be heard and to dispute evidence.

- [16] Somewhat generously the 1st respondent concluded that this failure to follow the timeframes warranted compensation in an amount equivalent to one month's salary.
- [17] The 1st respondents award sets out in some detail the evidence adduced at the arbitration, and analysis of that evidence and a conclusion that satisfies the test to be applied on review.
- [18] The prevailing test to determine the reviewability of an arbitration award is set out in the matter of *Herholdt v Nedbank Limited*¹. In summary, the position regarding the review of CCMA awards is this: 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.
- [19] The Labour Appeal Court in a judgement handed down shortly after the *Herholdt* decision said the following:
- [15] ...That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard

¹ 2013 (6) SA 224 (SCA) at paragraph 25

failure by the arbitrator to consider all or some of the issues *albeit* material as rendering the award liable to be set aside on the grounds of process-related review.

[16] In short: A review 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 which was reasonable to justify the decisions he or she arrived at.

[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.²

[20] It is abundantly clear from the award that the 1st respondent understood and considered the principal issue before him, evaluated the facts presented at the arbitration and came to a conclusion that was reasonable taking into account the material placed before him.

[21] Despite the applicant's argument to the contrary the weighing up of the conflicting evidence by the 1st respondent cannot be construed in any way whatsoever to be misconduct. In fact the 1st respondents conduct in this regard simply served to confirm that he discharged his functions as an arbitrator correctly

[22] there is no reason why the costs should not follow the result

[23] application dismissed with costs

Gush J

Judge of the Labour Court of South Africa

² Goldfields v CCMA J2/2012 paras 15 - 17

APPEARANCES:

FOR THE APPLICANT: C R du Plessis: Kleinkenberg Inc

FOR THE RESPONDENT: Adv G Kinghorn

Instructed by Frans F Erasmus Attorneys

LABOUR COURT