



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2245/12

In the matter between:

PONTSHO BLESSING MOTSHEKGA

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER EVA NGOBEN

Second Respondent

NATIONAL LOTTERIES BOARD

Third Respondent

Heard: 12 March 2015

Delivered: 7 August 2015

Summary: Review application. Commissioner refusing the employee the right to legal representation. Right to legal representation in dismissal for misconduct and incapacity governed by Rule 25 of the CCMA Rules. The Commissioner has discretion to permit or refuse legal representation.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made under case number GATW 8122012 dated 6 August 2012 in terms of which the dismissal of the applicant was found by the second respondent to have been for a fair reason.
- [2] The application includes an application for condonation in case it was to be found that the review application is late. In my view the application was not late and thus no need for the condonation application. If for whatever technical reason it was, the delay of few days is so insignificant that it would not serve the interest of justice not to condone the late filing of the review application. The late filing of the review application, if at all, is condoned.

Background facts

- [3] The applicant who was prior to his dismissal employed as field worker was dismissed for incapacity- poor work performance by the third respondent. The third respondent is the National Lottery Board ("the board"), a non-profit making organization established in terms of the Lotteries Act.¹ The key function of the board is to consider and award grants to organisations involved in charity work.

¹ Act no 57 of 1997.

- [4] The function of the applicant as field worker was to perform site visits to both organizations that have applied for a grant and those that have already received it. The purpose of these visits is two-fold, namely for those that have applied is to generate reports to advise the board on its consideration of the application for funding, and for those that are receiving funding from the board to generate reports that would reflect whether or not the funds are utilized in line with the purpose stated in the application for the grant. The other purpose of the visits is to check whether a grantee has proper internal controls.
- [5] It is common cause that during the course of his employment the applicant failed to meet the standard of performance required by the third respondent. He was for this reason placed on the training and mentoring referred to as “incubation” programs.
- [6] The applicant was dismissed by the third respondent following an incapacity hearing where she was found to have failed to meet the required standard of performance. Although there seems to have been some confusion as to under which provision of the policy the hearing was instituted, in substance it was however what the complaint against the applicant was. He was therefore not prejudiced by that confusion. Following an unsuccessful internal appeal against the dismissal, the applicant referred an unfair dismissal dispute to the CCMA. The arbitration proceedings which are the subject of these proceedings were conducted subsequent to failure of the conciliation. The outcome of the arbitration proceedings as indicated earlier was that the dismissal of the applicant was for a fair reason and thus the applicant’s claim of unfair dismissal was dismissed by the second respondent.

Grounds of review

- [7] The applicant has in challenging the arbitration award raised several grounds of review which includes failure to consider the relevant facts, misdirection in applying the facts and the law, gross misconduct and that the decision of the Commissioner is not just and reasonable.

- [8] The applicant further contends that her dismissal was flawed in that the third respondent in dismissing her applied an incorrect provision of its policy. The third respondent relied in this regard on clause 32(8) of the National Lotteries Board policy which according to the applicant does not relate to incapacity.
- [9] The other grounds upon which the applicant relies on in challenging the arbitration award is that the Commissioner disregarded:
- 9.1 The fact that the applicant's responsibilities were more than those of the other field workers and was overworked as compared to other field workers in the same position.
 - 9.2 the applicant's submission that there were no performance standards set for her.
 - 9.3 the applicant's submission that she was not given training timeously.
 - 9.4 the applicant's submission that after the incubation, he was expected to report to a senior official who in turn had challenges of his own.
 - 9.5 the applicant's submission that at the time of being provided with guidance, he had to travelled between Gauteng and Limpopo and was also doing assignments.
 - 9.6 the applicant's submission that the dismissal was harsh and that the third respondent failed to consider policy on managing poor work performance.
 - 9.7 the applicant's submission that at no stage was the applicant given a warning by the third respondent.

9.8 the fact that the third respondent had an opportunity to demote the applicant before considering dismissal as per the third respondent's policy.

[10] The other main point upon which the applicant relies on in challenging the arbitration award is that the Commissioner refused her legal representation.

The arbitration award

[11] Before dealing with the merits of the dispute the Commissioner had to consider the preliminary point relating to legal representation for the applicant. The Commissioner in refusing legal representation for the applicant reasoned that:

“Although the company is a big company, the representative failed to provide a justification when relying on comparative ability of the parties. This is not a complex matter and there is not going to be a question of law raised during the proceedings. The dispute is about whether the employee met the performance standard or not, and it is my view that the employee is better placed to respond to those questions without prejudice.”

[12] In relation to the merit of the dispute the Commissioner found that the applicant conceded that she had failed to meet the standard which had been set for her. She further found that the employee had been provided with training which had been extended from three months to six months. The applicant was according to the Commissioner placed on incubation whose purpose was to assist the applicant with his performance problem.

[13] The Commissioner further found that although there was some improvement in the performance of the applicant, he had still failed to perform at the standard required of him. In relation to the contention of the applicant that the third respondent ought to have demoted her rather than the dismissal, the Commissioner found that in term of the policy the third respondent had the discretion whether to demote the applicant in the context of poor performance.

Evaluation

[14] The first issue to consider in this application concerns the Commissioner's refusal to allow legal representation for the applicant during the arbitration hearing. The right to legal representation in the CCMA is governed by rule 25(1)(b) of the Labour Relations Act (the LRA), which provides:

- “(b) Subject to paragraph (c), in any arbitration proceedings a party to the dispute may appear in person or be represented only by-
 - i) a legal practitioner, or
 - ii) an individual entitled to represent the party at conciliation proceedings in terms of sub- rule (1) (a)
- (c) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relate to the employee's conduct or capacity, a party is not entitled to be represented by a legal practitioner in the proceedings unless-
 - i) the Commissioner and all the other party's consent;
 - ii) the Commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-
 - a) the nature of the question of law raised by the dispute;
 - b) the complexity of the dispute;
 - c) the public interest; and
 - d) the comparative ability of the opposing parties or their representatives to deal with the dispute.”

[15] It is trite that the right to legal representation, in disputes involving dismissal for misconduct or poor performance is regulated by the provisions of rule 25 (1)(c) of the CCMA Rules. The provisions of this rule are in line with the common law principle which does not provide for an absolute right to legal

representation in administrative tribunals.² The right to legal representation in arbitration hearings concerning dismissal for misconduct or poor performance was prior to the 2002 LRA amendment governed by s 140 of the LRA.

- [16] In *Netherburn Engineering CC t/a Netherburn Ceremics v Mdau*,³ the Labour Appeal Court, held that there was no general right to legal representation before an administrative body such as the CCMA.⁴ It follows in the context of this matter that the review ruling of the Commissioner disallowing legal representation has to be evaluated in the context of the principles governing the exercise of discretion to allow or refuse legal representation by the Commissioner in terms of rule 25 (1) (c) of the CCMA Rules.⁵
- [17] In the recent decision of *Commission for Conciliation, Mediation & Arbitration & others v Law Society of the Northern Provinces*⁶ the Constitutional overturned the decision of the Northern Gauteng High Court, which declared the sub-rule dealing with legal representation in the CCMA to be unconstitutional and invalid. The Constitutional Court in setting aside that judgment held that the sub-rule is sufficiently flexible to allow for legal representation in deserving cases.
- [18] In the present matter the legal representative of the applicant conceded during argument in these proceedings that the issue was not about the complexity of the matter but rather about equality of arms. At the arbitration hearing the applicant's representative argued that the applicant was entitled to legal representation because the third respondent "is a very big organization, equipped with the necessary knowledge and knowledge to deal with labour disputes," such as the present one.

² See *Hamata and Another v Chairperson of the Disciplinary Peninsula Technicon* Internal Disciplinary Hearing 2002 (5) SA 44 (SCA).

³ (2009) 30 ILJ 269 (LAC).

⁴ The Constitutional Court dismissed the appeal not on the merit but due to unreasonable delay and failure by the appellant to appear when the matter was heard by the LAC. This means the approach to adopt is that set out by the LAC.

⁵ See *Norman Tsie Taxi v Pooe* N.O (2004) ZALC 2 (2 January 2004).

⁶ (005/13) [2013] ZASCA 118 (20 September 2013)

- [19] In refusing to grant permission for legal representation the Commissioner found that the applicant had failed to make out a case for the exercise of the discretion in favor of allowing legal representation. In essence, he found that the matter was not complex and that the applicant had failed to show that there was inequality in the comparative ability between him and the representative of the third respondent to deal with the matter.
- [20] It is common cause that the third respondent was represented by its HR manager during the arbitration hearing. It is apparent from the reading of the record that the Commissioner had full appreciation of the issue she had to address in relation to the application for legal representation. She applied her mind to that issue and took into account the relevant factors in exercising her discretion not to allow legal representation during the proceedings. She took into account the fact that the matter did not entail any legal issue but was only concerned with the factual issue of the alleged poor performance by the applicant. The Commissioner, cannot in my view, be criticized for failing to exercise her discretion in a fair reasonable manner.
- [21] I now turn to deal with the merits of the review application and in doing so I apply the well established test of review set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁷. The test of review which has received attention in various judgments of this Court requires the review Court to determine whether the conclusion reached by the CCMA Commissioner is one which a reasonable decision maker could not reach. It is common cause that the applicant was dismissed for poor work performance. It has also not been disputed that the applicant failed to perform his duties to the required standard. The issue that then arises is whether the dismissal was, having regard to the totality of the facts and the circumstances of this case, fair.
- [22] The duty to show that the dismissal for poor work performance was done in accordance with the requirements of fairness rests with the employer. In addition

⁷ (2007) 28 ILJ 2405 (CC)

to showing that the performance of the employee was below the required standard the employer has to show that the dismissal was effected in line with the provisions of the Code of Good Practice: Dismissal. In terms of the Code the employer has to prove that:

- 22.1 The employee should have been aware, or could reasonably have been expected to be aware, of the required performance standard;
- 22.2 The employee was given the reasonable opportunity to meet the required standard;
- 22.3 Dismissal was an appropriate sanction for not meeting the required standard.

[23] In my view, the contention of the applicant that no performance standard was set for him bears no merit. The duties of the applicant appear very clearly from the record. His duties as indicated earlier in the judgment were to visit various potential beneficiaries and beneficiaries of the grant made by the third respondent. It is quite clear that the applicant was required to make reports timeously for the purposes of the third respondent considering the various applications for grants. The reports made by the applicant had to assist the third respondent in determining whether to approve or refuse an application for a grant.

[24] It has not been disputed that the two managers who were responsible for the supervision of the applicant had raised concern about the poor performance of the applicant. It was also not disputed that several informal meetings were convened with applicant where his poor performance was discussed. In this regard the applicant conceded during the meetings with him that his performance was unsatisfactory and he undertook to improve the same.

[25] In seeking to address the problem of the applicant's performance, the parties agreed on a training programme, including mentoring at the head office, referred to as incubation. The applicant was in this respect provided with training on

speed typing, business writing and report writing. In relation to the incubation program the applicant conducted the site visit under the supervision of Mr Makhathini, one of the managers of the third respondent. The second part of the incubation entailed report writing under the supervision of the same manager based at the head office.

- [26] Although there was some improvement after attending the above programs, the performance of the applicant remained below the standard. He still failed to meet the objectives of the site visits and his reports were fraught with mistakes. It was following this outcome that the second meeting was held where it was pointed out to the applicant that his performance was despite the training and the incubation still below the standard. It was also pointed out to him that his delay in submitting reports on time affected adjudication of the applications for grants.
- [27] At the third performance meeting the issue of poor performance was again raised with the applicant. He was specifically informed that he was still using the old and not the updated program which had been sent to him. The other issue raised with him related to failure to ask the right questions during his site visits, not preparing when undertaking the site visits and not submitting reports on time.
- [28] The only explanation tendered by the applicant for his poor performance was that he was overworked and that unlike other fieldworkers at the head office he did not have support.
- [29] The other ground upon which the applicant relies on in challenging the arbitration award is that the third respondent failed to apply its policy on managing poor work performance. In this respect he relied on the provisions of policy which reads as follows:

“4. Managing Poor Performance

All employees are expected to achieve not less than 100% (Target) for the salary they are being paid for.

Management must be able to identify and handle weaknesses in performance through the performance management system.

If at any time during the rating period an employee's performance is deemed to be **Not Reaching the Target** in one or more critical elements, the employee will be given a documented performance improvement plan by hi/her manger/supervisor and an opportunity to reach the Target in terms of the agreement/contract.

Employees must be under a performance plant for at least 90 days (3 months) before performance can be determined to be reaching the TARGET or not.

The length of the documented opportunity to improve may vary depending on the employee's position, type of work, etc.

The assessment meeting does not form part of any disciplinary process.

In short, the employee must be informed in writing that:-

His/her performance is not reaching the TARGET

The element(s) on which that rating is based and how the employee's performance did not reach the TARGET;

What the employee must do to reach the TARGET level of performance;

The specific assistance that will be provided to help the employee;"

- [30] The above provisions of the policy in my view serve as guidelines on managing poor work performance. It does not serve as a rigid rule on the approach to adopt when managing poor work performance. There is no doubt that except for failure to issue the applicant with the document required by the policy, the third respondent in the approach it adopted complied with all the basic principles contained in the policy. It follows therefore that upholding the point raised by the applicant regarding non-compliance with the policy would amount to placing form above substance.
- [31] The substance of the matter as required by the policy is that the applicant was informed about his failure to perform in accordance with his employment

contract. He was also made aware as to what he should do in order to comply with the standard required of him. It is common cause that the applicant was initially placed under a three month training programme which was later extended for a further three months. The same applies to the issue of the notice of disciplinary hearing as indicated although there was confusion about the provisions of the policy under which the hearing was instituted, the applicant was fully aware of the charge he had to answer to.

[32] The other issue raised by the applicant is that the dismissal is harsh because the third respondent ought to have demoted him before resorting to dismissal in terms of the policy. In this respect it is important to emphasize that the policy serves as a guideline, and thus its provisions are not mandatory. The balance between demotion and dismissal as a last resort depends on the facts and the circumstances of a given case. The facts and the circumstances of this particular case indicates clearly that in electing to dismiss the applicant without first demoting him, the third respondent acted in a fair manner.

[33] In light of the above discussion I find that the applicant has failed to make out a case warranting interference with the arbitration award of the Commissioner. I do not however believe that costs should be allowed to follow the result.

Order

[34] In the premises the applicant's application to review the arbitration award made under case number GATW 8122012 dated 06 August 2012, is dismissed with no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr T Phasha of TF Matlakala Attorneys

For the Respondent: Miss S Gabie of Cheadle Thompson & Haysom Inc.