THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2592/11

MEC FOR THE DEPARTMENT OF EDUCATION, MPUMALANGA PROVINCE	**Applicant**
and	
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**First Respondent**
MARTIN SAMBO *NO*	**Second Respondent**
PSA obo XABA & SIHLANGU	**Third Respondent**

Delivered: 14 August 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The Applicant seeks to have an arbitration award issued under the auspices of the First Respondent (GPSSBC) by the Second Respondent (Arbitrator) under case number GPBC1640 dated 30 August 2011 reviewed, set aside and remitted back to the GPSSBC to be heard afresh.

[2] In the award, the Arbitrator had found that the dismissal of the employees (Xaba and Sihlangu) was substantively unfair and ordered their reinstatement

with back-pay in the amount of R115 515.00 and R142 419.00 respectively. The application is opposed.

Background:

[3] Xaba and Sihlangu were employed as clerks in the applicant's Human Resources division. Sihlangu was a Principal Personnel Officer. Xaba was a Senior Administration Officer and had reported directly to Sihlangu. Xaba's duties entailed making adjustments to salaries, paying allowances, bonuses etc. Sihlangu's role as supervisor was to ensure that the process of making such payments was properly followed. Employees within the department get rewarded upon obtaining further qualifications or certificates such as Advanced Certificate in Education. Such certificates however should be captured on the applicant's system to enable payments to be properly processed.

[4] Xaba and Sihlangu were dismissed in August and September 2009. Their dismissal followed upon disciplinary enquiries into allegations of fraud dishonesty. The allegations were that that they had approved the payment of a qualification for an Advanced Certificate twice to a certain AS Mahlangu in the amount of R11 791. 75 on 23 June 2008 and again on 27 June 2008 in the amount of R26 209.50. The payments were made in circumstances where they were not due and without the necessary supporting documents.

[5] They were also charged with fraud in that they had also approved a payment in the amount of R18 250.00 on 9 January 2006 to a certain KS Mnguni. This amount was allegedly unduly paid without being reflected on the Transaction Log sheet, and was made without the support of the necessary documents. The Applicant's contention was that Xaba and Sihlangu had deliberately and intentionally paid Mnguni and Mahlangu dishonestly, having approved such payments for a period before these individuals had acquired the required qualifications or certificates.

The arbitration proceedings:

[6] An alleged unfair dismissal dispute was referred to the GPSSBC and came before the Arbitrator. Evidence was led on behalf of the employer by Mr Shika, its Chief Human Resource Officer to the effect that Sihlangu reported to her. He had testified that Mahlangu was paid twice for obtaining an advanced certificate. These payments were generated by Xaba and approved by Sihlangu. Further payments were made to Mnguni in circumstances where there was no justification in the latter's file in the form of a query form. The transaction and payment were prepared and approved by the same person, which was against established policies and procedures. Shika however testified that the payment was captured by Xaba and approved by Sihlangu.

[7] Under cross-examination, Shika had further confirmed that it was possible that more than one file could have been opened for one employee, but this was rare. He had further confirmed that the applicant had at some point issued a letter noting errors in the system. He conceded that both Mahlangu and Mnguni were in the process of repaying the amounts irregularly made to them and that the applicant had not suffered a loss as a result. He nevertheless emphasised that the backdating of payment to Mahlangu could not have been made erroneously.

[8] Sihlangu's evidence was essentially that it was possible to have more than one file for one employee and she had raised that as a concern. She had nevertheless received instructions from Shika to open a new file in the event that the original could not be found. In this regard, she testified that it was not impossible to make payment on a file that did not contain all the necessary documents.

[9] She had conceded having made a double backdated payment to Mahlangu, but contended that this was done in error. She nevertheless testified that there was no intention to deceive the applicant and that she had not gained any benefit from her actions. She had further admitted having approved the payments without the necessary query form.

[10] Xaba's testimony was that there are about 9000 teachers employed by the applicant and some had duplicate files. He conceded having made two payments to Mahlangu, but contended that the second payment was made in error as it was meant for another person with the same surname and initials. His contention was that the first and second payments were made in error. This was however as a result of a variety of factors including the bonus payment, which was in arrears in respect of Mnguni, the fact that there were incorrect calculations made, and an underpayment which was due to Mnguni in the amount of R9263.65.

The award:

[11] The Arbitrator had established that the dismissal of Xaba and Sihlangu was procedurally fair. He had however had regard to Item 7 of Schedule 8 - Code of Good Practice as contained in the LRA and found the dismissal to be substantively unfair on the following grounds;

(a) Both Xaba and Sihlangu admitted having made two payments to Mahlangu for an advanced certificate, and also having made the payments to Mnguni in an amount of R18 250.00 without the necessary supporting documents.

(b) Despite these concessions, there was no element of dishonesty or fraud in the actions of Xaba and Sihlangu.

(c) On the evidence of Shika, there were instances where telephonic and verbal queries could be made even if such had to be reduced in writing.

(d) Shika further confirmed that the calculations made in respect of Mnguni could have been incorrect and had conceded that there was an underpayment made. Nevertheless even if some money was due to Mnguni it was more the correctness of the calculation that should have been an issue.

(e) In respect of Mahlangu, the Arbitrator agreed with Shika that the back payments were not made in error, and that there was no justification by

Sihlangu for not recalling what documents she had used to approve the payment.

(f) The conduct of Xaba and Sihlangu was more negligent than fraudulent or dishonest, and they had not therefore breached *'the rules of dishonesty or fraud, but they were negligent in the execution of their duties'*

(g) The rules or standards applicable were reasonable as they were meant to curb maladministration of public funds, and Xaba and Sihlangu were aware of these rules or ought to have been aware of them.

(h) Since there was no dishonesty or fraud on the part of Xaba and Sihlangu, and further since their actions 'bordered' on negligence even though this was not the charge, a sanction of dismissal was unfair.

The legal framework and evaluation:

[12] The applicable test in review applications is whether the decision reached by the commissioner is one that a reasonable decision-maker could not have reached in relation to the material placed before him or her[1]. It has also been held that provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the arbitrator's decision is one that could not be reached by a reasonable decision-maker on the available material[2].

[13] In further summarizing the review test and in reference to *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*[3], the Labour Appeal Court (per Kathree-

[1] *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para [110]
[2] See *Goldfields Mining South Africa (Pty) Ltd v CCMA* (2014) 35 ILJ 943 (LAC) at para [20]. See also *South African Medical Association obo Mabuza and Others v Commissioner Moletsane and Others* (JR834/12) [2014] ZALCJHB 66 (14 March 2014) at para [8]
[3] [2012] 11 BLLR 1074 (SCA) at paras [12] and [13]

Setiloane AJA) in *Quest Flexible Staffing Solutions (Pty) Ltd (a division of ADCORP Fulfilment Services (Pty) Ltd) v Lebogate*[4] held that;

> "The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?". Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator" (Citations omitted)

The grounds of review and evaluation:

[14] In this case, I did not understand it to be the applicant's case that arbitrator failed to give the parties a full opportunity to state their respective cases at the hearing, or that he failed to identify the issue that he was required to arbitrate, or misunderstood the nature of the dispute. Central to the applicant's grounds of review is that the Arbitrator failed to deal with the substantive merits of the dispute and thus arrived at an unreasonable outcome.

[15] The first ground of review raised by the applicant was that the arbitrator ignored material evidence adduced by the applicant which was calculated to prove that there was a valid reason for the dismissal. Submissions made on behalf of Xaba and Sihlangu on the other hand were that the applicant had not pointed out what 'material evidence' which was adduced by it was ignored by the Arbitrator.

[16] Recently in *Shoprite Checkers v CCMA & others*[5], Myburgh AJ summarized the exposition of the review test as elucidated in *Head of the Department of*

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[4] [2015] 2 BLLR 105 (LAC) at para [12]
[5] Case no: JR2471/13 (Delivered on 31 July 2015)

Education v Mofokeng[6], and in particular where it is alleged in review proceedings that a Commissioner ignored some material facts. In this regard, it was held that;

> "This dictum in *Mofokeng* says many important things about the review test. But for present purposes, consideration need only be given to the guidance that it provides for determining when the failure by a commissioner to consider facts will be reviewable. The dictum provides for the following mode of analysis:
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> a. the first enquiry is whether the facts ignored were material, which will be the case if a consideration of them would (on the probabilities) have caused the commissioner to come to a different result;
> b. if this is established, the (objectively wrong) result arrived at by the commissioner is *prima facie* unreasonable;
> c. a second enquiry must then be embarked upon – it being whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness; and
> d. if the answer to this enquiry is in the negative, then the award stands to be set aside on review on the grounds of unreasonableness (and *vice versa*).
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> The shorthand for all of this is the following: where a commissioner misdirects him or herself by ignoring material facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable"[7].

[17] The facts of this case are relatively common cause up to a certain point. Sihlangu and Xaba had conceded that a double payment which was also backdated was made to Mahlangu. An irregular payment was equally made to Mnguni. Their main defense was that this was done in error. It was further common cause that these payments were made and approved without the necessary query forms and other supporting documents. Xaba's other defense was that the error was attributable to the fact there was another person with same surname and initials.

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[6] [2015] 1 BLLR 50 (LAC)
[7] At paras [9] to [10]

[18] The issue before the Arbitrator in the light of these concessions and common cause facts was which version was more probable. This required an analysis and evaluation of the probabilities and improbabilities of each party's version on the issue whether there was dishonesty and fraud or whether the payments were genuinely made in error as alleged by Xaba and Sihlangu. It further required a formulation of these contending versions and their weighing up to determine which one was the more probable.

[19] The Arbitrator in my view failed in regard to these obligations, and all that he came up with was that Xaba and Sihlangu did not strike him as *'none credible witnesses'*[8] (Sic). This credibility finding was made notwithstanding the Arbitrator's own conclusion that he agreed with Shika that the back-dating of the payment was not made in error, or his further conclusion that he had found no justification by Sihlangu as to the reason she could not recall what documents were used to approve the back dated payments. Furthermore, the Arbitrator had accepted the payments were made without the necessary supporting documents.

[20] In the light of these common cause facts, the concessions made and the Arbitrator's own conclusions, it was remarkable that he would nevertheless still conclude that the conduct of Xaba and Sihlangu was more negligent than fraudulent or dishonest, and they had not therefore breached *'the rules of dishonesty or fraud, but they were negligent in the execution of their duties'* (Sic). He made no finding as to the probabilities of Xaba and Sihlangu's version that their conduct was attributable to an error.

[21] In *Nedcor Bank Ltd v Frank and Others*[9], the Labour Appeal Court (per Wallis JA) held that *"Dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently*"[10]. The LAC further held that the term implied intention on the part of an employee. Negligence cannot give rise to a charge of dishonesty.

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[8] Page 6 of the award (page 27 of the indexed bundle)
[9] (2002) 23 ILJ 1243 (LAC)
[10] At para [15] See also John Grogan: Dismissal. (Juta) at p188

[22] An error ordinarily refers to a mistake or miscalculation. Negligence on the other hand refers to a failure to adhere or to act in accordance with a set standard of care. In general terms, an employee is negligent if his or her conduct deviates from the conduct that a reasonable person would have adopted in the same or similar set of circumstances. Negligence ordinarily does not require willfulness or intent.

[23] Once it was established that an act occurred in unjustifiable circumstances and was not as a result of an error as in this case, such an act could not therefore be attributable to negligence, more particularly in circumstances where this was not Xaba and Sihlangu's case at the arbitration proceedings or in the internal disciplinary enquiry. The Arbitrator's conclusion that the acts of Xaba and Sihlangu were due to mere negligence is unsupported by evidence, and was thus based on mere conjecture.

[24] Crucial in determining whether there was an element of dishonesty or fraud in this case was the fact that before the arbitrator, it was common cause that employees within the department use unique and personal persal numbers for the purposes of making payments. Even if there were two individuals sharing the same initials and surname, the unique persal number was used to distinguish between those individuals, and thus to prevent margins of error. The Arbitrator again ignored this factor.

[25] Where a payment, which was not due was made and approved without the necessary documentation, not once, but twice, and also in circumstances where payments could only be effected in accordance with the persal system, there cannot be talk of error or negligence. All these factors point to intent, and the Arbitrator chose to completely ignore them. The facts ignored by the Arbitrator including his own conclusions on the facts were indeed material, and had he properly considered them, he would have on a balance of probabilities, concluded that there was indeed dishonesty.

[26] There is therefore no merit in the submissions made on behalf of Xaba and Sihlangu that there was a clear explanation as to the reasons the payments were made, or that those reasons were not contested by the applicant. Of

significance is that the Arbitrator considered these explanations and rejected them *albeit* for different reasons.

[27] A further ground of review raised was that the arbitrator had misdirected himself as regards the issues before him as a result of which he made an award which in the circumstances was unreasonable. Submissions made on behalf of Xaba and Sihlangu in this regard were that the applicant failed to mention the specific issues that the Arbitrator allegedly misdirected himself with.

[28] Central in the provisions of section 188 of the LRA[11] is that an Arbitrator is required to determine whether the reason for a dismissal was fair, and this requires the Arbitrator to apply his or her mind fully to the issues before him and to consider whether the reason for the dismissal of Xaba and Sihlangu related to dishonesty and fraud was fair. It has already been concluded elsewhere in this judgment that the Arbitrator failed in this regard by completely ignoring or disregarding his own conclusions and common cause facts. In the light of the conclusions already reached, more particularly in regards to the material ignored, the Arbitrator misdirected himself in respect of this particular enquiry, especially in the light of the unreasonable conclusions reached in regards to the issue of negligence, which was clearly not an issue before him.

[29] Having evaluated the merits of the dispute, the common cause facts, the concessions made by Xaba and Sihlangu and the conclusions reached, I am satisfied that the facts ignored by the Arbitrator were indeed material, and had they been properly considered, the Arbitrator would have on a balance of probabilities, arrived at a different result. To the extent that the Arbitrator misdirected himself in ignoring such evidence, the award is reviewable as the distorting effect of this misdirection rendered the result of the award unreasonable. The Arbitrator's reasoning in the light of the material before him

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[11] "(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-
(a) that the reason for dismissal is a fair reason-
i related to the employee's conduct
(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act"

was unreasonable and the result cannot be justified. In these circumstances, it is concluded that the award should be reviewed and set aside, as the decision reached is one that a reasonable decision-maker could not have reached in relation to the material that was placed before him.

[30] The applicant in accordance with its Notice of Motion sought that the matter be remitted back to the GPSSBC for a fresh hearing before another arbitrator. In the light of conclusions reached in respect of the approach adopted by the Arbitrator, I am satisfied that fairness dictates that this matter be remitted back to be heard afresh. Furthermore, there is no basis in law or fairness for any cost order to be made.

Order:

i. The arbitration award, issued by the Second Respondent under case number GPBC1640 dated 30 August 2011is reviewed and set aside.

ii. The matter is remitted back to the First Respondent to be heard *de novo* before an Arbitrator other than the Second Respondent

iii. There is no order as to costs.

Tlhotlhalemaje

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Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Mr JM Matladi of the State Attorney
On behalf of the Respondent:	Adv GS Maritz
Instructed by:	M Wentzel attorneys