



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2095/13

JR 1828/13

In the matter between:

MANGAUNG METRO MUNICIPALITY

APPLICANT

And

SAMWU OBO A.S.SENOKO

FIRST RESPONDENT

ABRAHAM NTHAKO N.O.

SECOND RESPONDENT

SALGBC

THIRD RESPONDENT

Heard: 13 August 2015

Delivered: 27 August 2015

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer as 'the arbitrator'. In his award, the arbitrator ordered the applicant to reinstate Mr Seneko, on whose behalf the first respondent acts.

[2] The dispute before the arbitrator was whether or not the applicant had acted unfairly toward the employee by not reinstating or re-employing him in terms of a collective agreement. The first respondent relied on s 186 (2) (a) of the LRA which provides that it is an unfair labour practice to fail or refuse to 'reinstate or re-employ a former employee in terms of any agreement.' The pre-arbitration agreement concluded by the parties formulated the dispute in the following way:

The commissioner must determine whether the respondent has committed an unfair labour practice i.t.o section 186 (2)(c) of the LRA for refusing to re-employ Mr Seneko i.t.o the 'LLF' agreement of 1 May 2011 (as per bundles).

[3] Some background is necessary to understand the context within which the dispute was referred to arbitration. The LLF agreement is an agreement concluded on 11 May 2011 by the Mangaung Local Labour Forum. It provided, amongst other things, for limitations on the use of external lawyers to conduct disciplinary hearings. The provision that is relevant for present purposes reads as follows:

Utilization of external lawyers to conduct disciplinary hearing abolished retrospectively with effect from 1 July 2010.

Declare all disciplinary hearings conducted – where charges were served by lawyers – after 4th May 2010, null and void...

Reinstate all the affected employees retrospectively from date of dismissal.

- [4] The charges brought against the employee were filed on 3 November 2009, and served on him by a practising attorney. An amended charge sheet was served on him on 20 November 2009. The notice of a disciplinary hearing is dated 9 November 2009, and the matter proceeded to finality when the employee was dismissed on 1 September 2010. First respondent contended that the employee was entitled to reinstatement in terms of the LLF agreement. The applicant contended that the agreement was intended to declare null and void only those disciplinary hearings where charges had been served by external lawyers after 4 May 2010. Since the charges against the employee had been served in November 2009, the agreement did not apply to the employee who accordingly had no right to be reinstated. The applicant therefore did not commit an unfair labour practice.
- [5] The arbitrator rejected this interpretation of the agreement and ruled in favour of the first respondent. Insofar as the arbitrator's reasoning can be discerned from the terms of the award, it is apparent from the following paragraphs:

[32] The agreement on page 10 of bundle A states that: 'Declare all disciplinary hearings conducted – where charges were served by lawyers – after 4th of May 2010, null and void'. The employee was served with charges on 20th November 2009 but he was dismissed on 1st of September 2010 as indicated above. The employer submitted that the Employee was charged and served with the charges on the third and 20 November 2009, before 4 May 2010. Therefore, he is not covered by the agreement as it refers to charges after 4 May 2010. The Employer read and interpreted that part of the agreement in isolation.

[33] in weighing evidence and submissions made, all evidence and submissions made should be looked into in order to arrive at a just and equitable decision. Now, there is a conflict in dates with regard to serving of charges and the abolishment of the utilisation of external lawyers. The question that I was left

with was whether the employee was affected in terms of the agreement. Because the employer made use of external lawyers at the time of the dismissal of the employee, and after 1 July 2010, it was my view that the employee was affected by the whole situation.

- [6] In essence, the applicant contends that the arbitrator committed an error of law by misconstruing the terms of the agreement. As I have indicated above, the applicant submits that the terms of the collective agreement are clear and are concerned only with matters where charges had been served by an external lawyer prior to 4 May 2010. The effect of the arbitrator's reasoning was to extend the terms of the agreement to include an employee (such as the employee in the present instance) dismissed after this date.
- [7] This court is entitled to intervene and set aside the arbitrator's award if and only if the arbitrator's decision is so unreasonable that no reasonable decision-maker could come to the same decision on the available material. The current authorities require the court first to enquire as to whether the arbitrator committed to reviewable irregularity and if so, whether there is a basis considering the evidence that served before the arbitrator overall to displace the problem facing the case of unreasonableness that is established in consequence. If the answer to the latter enquiry is in the negative, the award stands to be reviewed and set aside on the grounds of unreasonableness. In other words, if an arbitrator misdirects him or herself by ignoring material facts, commits an error of law and the like, the award is reviewable only if the distorting effect of the misdirection is to render the award unreasonable.
- [8] In the present instance, it ought to be borne in mind that the commissioner was not required directly to interpret the collective agreement – the dispute before him was one that related to an alleged unfair labour practice committed by the applicant. The determination of that dispute obviously required an interpretation of the collective agreement and the question therefore is whether it can be said that the arbitrator misdirected himself by arriving at the interpretation that he did

- [9] The collective agreement is not a model of clarity. On the contrary, the language used is cryptic and the structure of the relevant provisions is not conducive to easy analysis. Be that as it may, it is clear that the separate parts of those provisions of the collective agreement that are relevant to the present dispute must necessarily be read in context with the provision as a whole. The first part of the provision it would seem to me creates a general rule, namely that the use of lawyers is prohibited, with retrospective effect from 1 July 2010. The second part of the provision covers those matters where charges were served by practising lawyers after 4 May 2010. The real issue is whether all disciplinary hearings were conducted after 4 May 2010 or whether the consequence of nullity is limited to those hearings where charges were served after 4 May 2010, irrespective of the date on which the hearing was conducted.
- [10] In my view, the interpretation contended for by the applicant, which seeks to interpret the relevant provision of the collective agreement disjunctively and to determine nullity only by reference to the date on which charges were brought against the employee is an interpretation that can be sustained on the wording of the agreement, but it is not the only interpretation. What is more important for present purposes, the contrary interpretation adopted by the arbitrator is not so unreasonable that it falls outside of the bounds of reasonableness that define the threshold for review. In other words, the collective agreement is reasonably capable of an interpretation to the effect that all disciplinary hearings conducted after 4 May 2010 where the charges had been filed by external lawyers, are null and void and the affected employees are entitled to reinstatement. In those circumstances, it cannot be said, in my view, that the arbitrator either committed any irregularity in his interpretation of the provision in question or that his conclusion, based on that interpretation, that the applicant had committed an unfair labour practice by refusing to reinstate the employee is unreasonable.
- [11] In the circumstances, the applicant's failure or refusal to reinstate the employee in accordance with the provisions of the agreement constitutes an unfair labour practice.

[12] For these reasons, the review application stands to be dismissed. It follows that the application to have the award under review made an order of court should succeed. In relation to costs, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. In my view, those interests are best served by an order to the effect that each party pays its own costs.

I make the following order:

1. The application is dismissed.
2. The arbitration award issued by the South African Local Government Bargaining Council under case number FSD 011312 on 21 July 2013 is made an order of court in terms of s 158 (1) (c) of the LRA.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv JL Basson instructed by Moroka Attorneys

For the first respondent: Adv P Venter instructed by Maenetja Attorneys