



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 755/12

In the matter between:

SAMWU obo BARENG MATHIBE

APPLICANT

and

MORETELE LOCAL MUNICIPALITY

FIRST RESPONDENT

SALGBC

SECOND RESPONDENT

MARELEZE SWANEPOEL N.O.

THIRD RESPONDENT

Heard: 28 August 2015

Delivered: 31 August 2015

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the third respondent, to whom I shall refer as 'the arbitrator'. In her award, the arbitrator upheld the dismissal of Mr Mathibe (the employee), on whose behalf the applicant acts.
- [2] The material facts are recorded in the arbitrator's award and I do not intend to repeat them here. For present purposes, it suffices to say that the employee was employed by the first respondent as the Manager – Revenue services and that he was dismissed on 27 September 2011 after a disciplinary enquiry into allegations of sexual harassment. The complainant in the enquiry was a subordinate of the employee who alleged that she had been the subject of unwelcome sexual advances by the employee between June 2005 and June 2011 when after treatment by psychologist for depression, she decided to lodge a complaint against the employee. The employee, in broad terms, denied that he had ever harassed the complainant and averred that her complaint was the consequence of complaints about her work performance and poor timekeeping.
- [3] In her award, the arbitrator recorded that she was faced with two mutually destructive versions. She held that the first respondent's version was the more probable, having regard particularly to the unchallenged evidence of the complainant (her version had not been challenged under cross-examination) and the poor quality of the evidence of both the employee and the witness that he called. The arbitrator's reasoning for coming to the conclusion that she did is captured in paragraph 39 of the award, which reads as follows:

[39] Lorraine's testimony I find was consistent with regard to the acts of harassment and despite confusion with regard to the exact times at which certain incidents had taken place I still find that on a balance of probability she was in fact harassed by the applicant. The applicant's second witness, Anna Matlala, actually only further cause me to doubt the applicant's version of Lorraine's failure to comply with instruction and poor work performance. She testified that there was numerous letters in which complaints about Lorraine was highlighted and yet when she was given an opportunity to go and collect the letters she returned to the arbitration with the new version that she couldn't find them and that she had made copies and given them to the union official who quite conveniently did not attend the arbitration. Again I have to agree with the respondent's representative that her evidence was fabricated and that she was couched (sic) what to say.

- [4] The applicant raises three grounds for review. The first is that the arbitrator misconducted herself in finding that the employee was charged with four charges, when in fact he faced only two charges. The second ground is that the arbitrator misconducted herself in finding that, on a balance of probabilities, the employee had sexually harassed the complainant. The third ground for review is that the arbitrator had regard to the Code of Good Practice but disregarded the fact that the first respondent did not have a policy as required by the Code and that there had been no attempt to resolve the matter informally.
- [5] 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 a 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.

- [6] In relation to the first ground for review, the charge sheet issued to the employee recorded that he was charged with four counts of misconduct. In the finding and outcome report prepared by the chairperson of the disciplinary enquiry, it is clear that the first respondent sought to consolidate the charges, which were reduced to 2. The award simply set out the charges as they appeared on the charge sheet, prior to their consolidation. This cannot be said to be a finding in respect of the number of charges, certainly not a finding that is capable of review.
- [7] In relation to the second ground, it should be recalled that a failure by a commissioner to apply his or her mind, reliance on irrelevant considerations or the ignoring of material evidence is not in itself a basis for review. Ultimately, the enquiry is whether any misdirection is of this nature had the result of a decision to which no reasonable decision-maker could come on the available material. I'm not satisfied, having regard to the record of the proceedings under review, that the arbitrator committed any misdirection. The record discloses that the complainant testified about incidents of harassment and that she was then cross-examined by a union official. Nowhere in that cross-examination was it ever put to the complainant that the employee did not do what she alleged he had done. In short, her testimony was not disputed and no contested version was put to her. When the employee presented his evidence, he averred that he had been accused of harassment on account of issues relating to the complainant's work performance and attendance. In other words, the arbitrator was confronted with the complainant's version which had gone unchallenged, and the employee's averment that he had been falsely accused of harassment, a version that was never put to either the complainant or any of the relevant witnesses. The arbitrator assessed the evidence and decided that the first respondent's version was the more probable, for the reasons set out in her award. She referred (correctly) to the relevant authorities relating to the assessment of probability and came to a finding that the balance of probability suggested that the complainant

had been harassed. In the circumstances, in my view, it cannot be said that the arbitrator committed a reviewable irregularity in relation to assessment of the evidence or her factual finding. It follows that there is no merit in the second ground for review.

- [8] The third ground for review, as I have indicated above, is that the arbitrator made reference to the relevant statutory code of good practice but disregarded the fact that the first respondent did not have a policy relating to sexual harassment of which the employee had been made aware, and in particular, that they had been no attempt to resolve the matter informally. It should be recalled that the arbitrator made reference to the statutory code only in relation to the definition of sexual harassment (see paragraph 32 to 34 of the award). That does not incumbent on the arbitrator to make any decision in relation to the extent of the first respondent's compliance (if any) with other provisions of the code. It was never the applicant's case that the first respondent had failed to comply with the provisions of the code or, more importantly, that the employee's dismissal was unfair as a consequence. The applicant did not dispute that the employee's dismissal was unfair because there had been no attempt to resolve the issue on a less formal basis. This is a case that is made out on review and which in any event as no bearing on the reasonableness of the outcome of the arbitration proceedings.
- [9] To the extent that the applicant relies on the decision by this court in *SA Metal Group (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2014) 35 ILJ 2848 (LC) to submit that a failure by an arbitrator to have regard to the statutory code on the handling of sexual harassment cases is a ground for review, the failure alleged by the applicant in the present instance is a failure by the first respondent, not by the arbitrator. The judgment referred to concerns assumptions and omissions on the part of an arbitrator which had the result that he failed properly to assess the evidence of the complainant. The judgement does not suggest that it is incumbent on an arbitrator to look beyond the terms of the dispute referred to arbitration and assess whether the employer party has

complied in every respect with the code of practice in effecting disciplinary action on account of sexual harassment, even least does it suggest that any failure to do so is a ground for review

[10] For the above reasons, in my view, the arbitrator did not commit any act of misconduct in relation to the proceedings under review, nor did she commit any reviewable irregularity. Even if I'm wrong in coming to that conclusion, the evidence that served before the arbitrator does not suggest that the decision to which the arbitrator came fell outside of the band of decisions to which reasonable people could come on the basis of that evidence. In particular, the failure by the employee's representative to challenge the complainant's version and his failure in particular to put the version ultimately presented by the employee in his evidence to the complainant for her comment, as well as the poor quality of the evidence of the witness called by the employee to support his version, all serve to sustain the reasonableness of the outcome of the proceedings. For these reasons, the application stands to be dismissed.

[11] In relation to costs, the court has a broad discretion in terms of section 162 of the Act to make orders for costs having regard to the requirements of the law and fairness. Although this court traditionally declines to make costs orders in disputes between collective-bargaining partners, the rationale for that practice is related to the potential prejudice that a costs order might have on the nature of that relationship. In the present instance, the dispute between the parties is not a collective dispute and has no bearing on their collective-bargaining relationship. It is a dispute concerning the dismissal of an individual for an act of serious misconduct. I fail to appreciate on what basis the ratepayers of the first respondent should be saddled with the burden of meeting the costs of opposing an application so devoid of merit.

I make the following order:

1. The application is dismissed, with costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT OF SOUTH

AFRICA

APPEARANCES

For the Applicant: Mr. X. Ngako, Ruth Edmonds Attorneys

For the Respondent: Adv. C. Prinsloo, instructed by Mosire Tsiane Attorneys