



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 381/13

MESHACK MOLATLHEGI

Applicant

and

PAUL KIRSTEIN

First Respondent

**SAFETY AND SECURITY SECTORAL BARGAINING
COUNCIL**

Second Respondent

MINISTER OF SAFETY AND SECURITY

Third Respondent

SOUTH AFRICAN POLICE SERVICE

Fourth Respondent

COMMISSIONER OF POLICE

Fifth Respondent

Delivered: 9 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] With this application, the Applicant seeks an order review and set aside the arbitration award issued by the First Respondent (Arbitrator) on 21 January 2013 under the auspices of the Second Respondent (SSSBC). In the award, the Arbitrator found that the dismissal of the applicant was substantively fair.

Background:

- [2] The Applicant was employed by the Fourth Respondent (the SAPS) as a Captain and was stationed at Ga-Rankuwa. He was also a C shift Commander at Client Service Centre. He was dismissed on 10 August 2011 following a disciplinary enquiry into allegations of misconduct pertaining to;

- 1) Contravention of Regulation 20 (Z) of the SAPS Discipline Regulation in that between 2012-09-24 at 19h00 and 2010-09-25 at 0700 near Mabopane SAPS he had committed a common law offence of fraud in that he had signed a nightshift claim for Warrant Officer Stokes knowing that he was not on duty;
- 2) Contravention of Regulation 20 (b) of the SAPS Discipline Regulations on 2010-09-02 at Mabopane SAPS in that he intentionally or negligently mismanaged the finances of the state in that he allowed or permitted Warrant Officer Stokes to claim a nightshift allowance

The arbitration proceedings and the award:

- [3] Having referred an alleged unfair dismissal dispute to the SSSBC, the matter came before the Arbitrator on 6 December 2012 for arbitration. No oral evidence was led at the arbitration proceedings. The parties had agreed to have the matter determined on the basis of written heads of argument, bundles submitted and the transcript of the internal disciplinary enquiry.
- [4] In his award, the arbitrator had regard to the transcript of the disciplinary enquiry and the SAPS' summary of the evidence presented at the enquiry. He further took account of the fact that the Applicant failed to testify at the disciplinary enquiry but had called a witness Constable Nkadimeng to testify on his behalf. Stokes had passed away prior to the arbitration proceedings. It

was nevertheless common cause that both the Applicant and Stokes were dismissed for the alleged misconduct in question.

[5] Having had regard to the summary of the evidence, the Arbitrator further summarised that evidence as follows;

- a) The nightshift allowance document was given to members by Constable Nkadimeng every first nightshift of the month to be completed as the month progressed.
- b) Stokes did not report for duty on the nightshift of 24 September 2010. Nevertheless, the Applicant had signed and certified the schedule for payment of the nightshift allowance which included the incorrect indication that Stokes worked a 12 hour nightshift on 24 September 2010.
- c) Stokes had informed the Applicant that he would not be reporting for the nightshift in question because of personal problems.
- d) The Applicant's defense in argument was that there was a practice within SAPS in terms of which the Commander would sign a blank nightshift allowance document at the beginning of the month,

[6] In the light of the above evidence and arguments, the Arbitrator concluded that;

- a) At the time that the Applicant signed the document at the beginning of September 2010, he was not aware that Stokes would not report for his nightshift on 24 September 2010. When he became aware that Stokes was not going to report for nightshift, the document was already signed. Accordingly, to the extent that the document was pre-signed, it could not be said that he had committed fraud.
- b) The alleged practice of having the nightshift allowance document signed at the beginning of the month was highly irregular as it created an opportunity for fraud.
- c) SAPS had proven on a balance of probabilities that the Applicant indeed intentionally mismanaged the finances of the state in that he allowed Stokes to claim for nightshift when it was not due to him.

- d) The Applicant had failed to place his version on record in the internal disciplinary enquiry and at the arbitration proceedings.
- e) The intentional mismanagement of finances did not only include the signing of the nightshift allowance document in terms of the irregular practice but also the misrepresentation that the content of the document had been verified and certified as correct.
- f) The intentional mismanagement of finances should be regarded as a sufficient reason to warrant a sanction of dismissal.

The grounds of review and evaluation:

- [7] It is now fairly well established that the reviewing court can only interfere with an award in circumstances where it is established that the decision arrived at by the arbitrator is one that another reasonable decision maker could not have arrived at in the light of the material placed before him or her. Further in accordance with the *Sidumo*¹ test, the issue is whether 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 merits².
- [8] In broad terms, the grounds of review relied upon by the Applicant were that the Arbitrator committed gross irregularity by not allowing him the opportunity to address him on the fairness of the sanction imposed; failed to apply his mind to the appropriateness of sanction, and further misconstrued the nature of the enquiry. It was further contended that once the Arbitrator had concluded that the applicant had not committed fraud, he should have allowed the respective parties to address him on the fairness of the sanction, and should have applied his mind to the reasons submitted by the chairperson of the enquiry for dismissing the applicant.
- [9] It is trite that arbitration proceedings before a Bargaining Council are conducted *de novo*. What this implies is that as required by the provisions of

¹ [2007] 12 BLLR 1097 (CC)

² *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]

section 188 (1) and (2) of the Labour Relations Act, an arbitrator is required to consider whether or not the reason for the dismissal based on misconduct was a fair reason. Where however at such proceedings, the parties agree not to lead any oral evidence, and place a transcript of the internal disciplinary process before the arbitrator as 'evidence', the dangers with this approach are and will always be catastrophic. This approach has its inherent risks and in my view, once it is agreed upon, the parties must stand and fall by it, simply for the reason that they essentially waive their rights to a proper determination of the issues, more particularly whether the reason for a dismissal was fair. They cannot therefore complain about not being afforded an opportunity to a fair hearing or a full opportunity to state their respective cases at the hearing.

- [10] Murphy AJA in *C Arends & Others v SALGBC & Others*³ had identified the difficulties associated with this risky approach. This is even more pertinent where the parties merely placed documents before the arbitrator without a proper statement of case even where there is a potential for material disputes of fact to arise. Murphy AJ further indicated that where such an approach is adopted, it was imperative that at the very least, there should be a written statement of the facts agreed by the parties, akin to pleadings⁴.
- [11] At most, where the parties do not file proper statements of case, at the very least, it should be expected of them to hold and conclude a proper and detailed pre-arbitration hearing and minutes, which will give the Arbitrator some sense as to what the common cause facts are, what those in dispute are, and what exactly it is that requires his or her determination.
- [12] In this case, the pre-arbitration minutes⁵ concluded by the parties are cursory and unhelpful. The identified common cause facts and those in dispute as recorded in the pre-arbitration minute are clearly meaningless and of no assistance to any arbitrator required to determine the dispute. No reference was made to the charges that led to the dismissal and even if reliance was placed on the transcript of the disciplinary enquiry, no reference is made to it

³ [2015] 1 BLLR 23 (LAC)

⁴ At para [15]

⁵ Page 103 of the indexed bundle

to identify any disputed or common cause facts. There was no indication in what material respects the findings of the chairperson were placed in dispute. In my view, it appears that the parties were content to place voluminous documents in front of the Arbitrator and for him to make sense of it all. What escaped the parties however when adopting this particular arbitration process and approach is that firstly, documents do not speak for themselves, and secondly, written heads of argument do not constitute evidence.

[13] In the light of arbitration proceedings being *de novo*, the difficulties the parties will always encounter when they agree not to present oral evidence is that they cannot speak of an Arbitrator having ignored evidence pertaining to material disputes of fact when no such evidence was tendered. Even worse for the applicant in this case, is that he did not testify at both the internal disciplinary enquiry and the arbitration proceedings. In such circumstances, the SAPS' case against him remained uncontroverted.

[14] With the path that the parties took, the arbitrator was deprived of the chairperson's testimony in regards to whether there was any basis to conclude that he did not properly apply his mind to the facts before him. There was nothing placed before the Arbitrator by way of oral evidence to indicate in what material respects the chairperson should not have arrived at his conclusions. In his findings, the chairperson had concluded that the misconduct in question was serious and had an impact on the organization and the public. He had further pointed out that the misconduct in question was deceitful and dishonest. He took into account that the Applicant occupied a high position of responsibility and had found him guilty on both charges. These factors accordingly sustained a sanction of dismissal.

[15] I therefore have difficulties in comprehending any submissions to the effect that the Applicant was not afforded an opportunity to address the Arbitrator on the fairness of the sanction when he, through his legal representative, consciously took a decision not to testify at the arbitration proceedings. The Arbitrator through the process chosen by the parties was placed in an invidious position, as what he was required to do was akin to an appeal hearing rather than a *de novo* arbitration process.

[16] To the extent that the Applicant chose not to lead any evidence even at the arbitration proceedings, the Arbitrator was therefore granted latitude to consider the documents before him and come to a reasonable decision, which he had. There was nothing placed before him to gainsay the chairperson's findings, and to this end there is no basis for a conclusion to be reached that his decision was one that a reasonable decision maker could not have come to in the light of the documentary material placed before him. In essence, there was nothing placed before the Arbitrator for him to make any finding that the dismissal was substantively unfair. In the light of the approach the parties had adopted, there was no obligation on the Arbitrator to call them in regards to the issue of appropriateness of the sanction as he was afforded latitude to make that decision based on what was placed before him. Accordingly, the application to review the award should fail. I have further had regard to the issue of costs, and I am of the view that there is no basis for such an order to be made.

Order:

- i. The application to review and set aside the arbitration award issued by the First Respondent under case number PSSS229-12/13 is dismissed.
- ii. There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr JM Gouws of Johan Gouws Attorneys

On behalf of the Respondent: Adv Makoti

Instructed by: The State Attorney

LABOUR COURT