



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2044/12

In the matter between:

THE DEPARTMENT OF NATIONAL TREASURY

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

PZG PEKALSKI N.O.

Second Respondent

K MOODLEY

Third Respondent

MS BALOYI N.O.

Fourth Respondent

Delivered: 16 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This application was brought before the Court in terms of section 158 (1) (h) of the Labour Relations Act¹ (the LRA). In its Notice of Motion, the Applicant sought the following order;

¹ Act 66 of 1995 as amended.

- “1. That the arbitration award handed down by the second respondent in favour of the third respondent dated 2 July 2012 be and is hereby reviewed and set aside.
2. That the matter be remitted back to the Bargaining Council to be heard *de novo* before another arbitrator
3. Alternatively to the above, that the decision of the fourth respondent imposing a sanction of demotion of the third respondent be and is hereby reviewed and set aside.
4. Costs only in the event of opposition by any respondent.
5. Such further and/or alternative relief as the Honourable Court seems meet” (Sic)

[2] In the award, the Second Respondent (Arbitrator) had concluded that the Third Respondent (Moodley), who was found guilty at the internal disciplinary enquiry on nine out of eleven charges of misconduct, was given an option of either a dismissal or demotion by the Chairperson of that enquiry, and had accordingly elected the latter sanction. To the extent that the Chairperson of the enquiry had afforded Moodley that option, the Arbitrator concluded that the subsequent decision by the Applicant to dismiss her was unfair. The Arbitrator ordered that Moodley should be reinstated with retrospective effect, subject to a demotion. The application for review is opposed on a variety of grounds. Preliminary points were also raised on behalf of Moodley.

Background:

[3] The background facts are fairly common cause and can be summarised as follows:

- 3.1 Moodley was employed as Director: Facilities Management with effect from August 2007. On 19 April 2011 she was notified to attend a disciplinary enquiry to answer to eleven charges of misconduct which included *inter alia*, conflict of interest, non-compliance with Supply Chain Management Policy, failure to comply with the employer's leave policies and procedures as she was absent from work without

authorisation for 48 days, and abuse of authority and the employer's assets.

3.2 The Fourth Respondent (Chairperson) had following the disciplinary enquiry, issued her findings on 24 December 2011, wherein Moodley was found guilty on nine of the eleven charges of misconduct. Having afforded the parties' representative an opportunity to present mitigating and aggravating factors, on 9 February 2012 the Chairperson issued a sanction in respect of each of the charges Moodley was found guilty on, including a dismissal (in respect of five charges), warnings and written warnings (in respect of two charges), and a final written warning (in respect of two charges).

3.3 Despite the above verdict, the Chairperson's final determination on the matter was as follows;

"The sanction of dismissal is imposed with a demotion as an alternative.

*Paragraph 7.5.18 of the employer's Employee Relations Guideline shall apply"*²

3.4 Moodley on 15 February 2012 accepted the option of a demotion via a letter sent to the Applicant by her attorneys of record. The Applicant however sought clarification of the decision from the Chairperson of the enquiry. The Chairperson in clarifying the matter stated that paragraph 7.5.18 of the Applicant's Employee Relations Guidelines empowered her in circumstances where a disciplinary enquiry involved a member of the SMS, to impose the sanction of dismissal with the alternative of, *inter alia* a demotion. Thus the primary sanction of dismissal was imposed and the alternative of demotion applied only should the employee agree to the demotion instead of a dismissal. The Chairperson further stated that the provisions mentioned required a sanction as determined by her to be presented to the employee for her to make an election whether to accept dismissal or demotion. Where

² Pages 19 – 49 of the indexed bundle

the employee elected demotion, in terms of the provisions of paragraph 7.5.18, that employee shall not be eligible to apply for a promotion before the expiry of one year after the sanction was imposed.

- 4.5 Upon the above clarification, the Applicant nevertheless decided to impose a sanction of dismissal on 20 February 2012, its view being that the charges against Moodley were of a serious nature, and the sanction imposed by the Chairperson was grossly unreasonable. In a letter from the Applicant's Director-General, Moodley was further informed that she was discharged in terms of section 16B (1) of the Public Service Act, 1994 (as amended) on account of misconduct in that she was found guilty of several charges.
- 4.6 Moodley had then referred a dispute to the First Respondent on 13 March 2012. A certificate of outcome was issued on 5 April 2012, and the matter came before the Arbitrator on 19 June 2012.
- 4.7 On 20 May 2012, the Applicant's representative, Richter had requested that the parties prepare a pre-arbitration minute in preparation for the hearing. The parties had thereafter agreed to limit the issues to the fairness of the sanction imposed by the Applicant, and to have the matter determined based on arguments and documentation to be presented to the Arbitrator.
- 4.8 In accordance with the parties' agreement, no oral evidence was led at the arbitration hearing held on 19 June 2012, and the parties had handed in bundles of documents and written heads of argument. The Arbitrator issued the award on 2 July 2012.

Preliminary points and evaluation:

- (a) *Section 158 (1) (h) or section 145 of the LRA?*

- [5] The application in terms of section 158 (1) (h) of the LRA³ was filed on 21 September 2012. Contentions made on behalf of Moodley were that the

³ Which provides the Labour Court may—

application before the Court was clearly irregular, especially since the primary subject of the review was the arbitration award handed down by the Arbitrator. It was submitted on behalf of Moodley that an arbitration award is subject to review in terms of section 145 of the LRA⁴, and not in terms of section 158 (1) (h), and that different rules and procedures arose from these two provisions.

- [6] Notwithstanding the fact that the application was brought under the provisions of section 158 (1) (h) of the LRA, when the matter was argued before court, Adv Mokhari SC on behalf of the Applicant disavowed any reliance on the provisions of section 158 (1) (h) of the LRA, and contended that the application should be considered under the provisions of section 145 of the LRA. The argument was that the award was defective within the contemplation of section 145 (2), and that in the founding affidavit, it had been submitted that the award was grossly unreasonable and irrational, and that the Arbitrator had failed to determine the issue for arbitration as required by section 138 of the LRA.
- [7] It is trite that the review of arbitration proceedings under the auspices of the CCMA or Bargaining Councils must proceed under the provisions of section 145 of the LRA⁵. The distinction between the provisions of section 145 and

“review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;...”

⁴ Sec 145 provides as follows:

"145 Review of arbitration awards

(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission for Conciliation Mediation and Arbitration may apply to the Labour Court for an order setting aside the arbitration award -

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or
(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(2) A defect referred to in subsection (1) means -

(a) that the commissioner

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may -

(a) determine the dispute in the manner it considers appropriate; or

(b) make any order it considers appropriate about the procedures to be followed to determine the dispute"

⁵ *Carephone (Pty) Ltd v Marcus NO & Others* 1999 (3) SA 304 (LAC) at paragraph 26

those of section 158 (1) (h) are not merely formal and technical as argued on behalf of the Applicant. Different rules and procedures are applicable where these provisions are relied upon.

- [8] As also correctly pointed out on behalf of Moodley, the grounds of review under section 145 of the LRA are limited to those referred to in section 145 (2), whereas the grounds of review in terms of section 158 (1) (h) are wider. Furthermore, applications brought in terms of section 158 (1) (h) are subject to Rule 7 of the Rules of this Court and must be filed within a reasonable period, whilst those brought in terms of section 145 are subject to Rule 7A of the Rules, and should be filed within six weeks of the award being issued.
- [9] I have taken regard of contentions made on behalf of Moodley that it is doubted whether the Applicant can review its own decisions. In this regard, it is my view that it should be accepted flowing from *Hendricks v Overstrand Municipality and Another*⁶ that the Labour Court has the power under section 158(1) (h) of the LRA to review the decisions taken by a presiding officer of a disciplinary hearing. The Applicant is an organ of state as defined in section 239 of the Constitution⁷, and it is accepted that any decision taken by it in dismissing Moodley subsequent to the decision of the Chairperson is an exercise of a public power or performing a public function.
- [10] I am further in agreement with the submissions made on behalf of Moodley that an application for the review of the Arbitrator's award in terms of section 158 (1) (h) of the LRA is clearly untenable, especially in view of the fact that Rule 7A rather than Rule 7 was relied upon in bringing that application. There is therefore no merit in the Applicant's approach that these issues were

⁶ [2014] 12 BLLR 1170 (LAC) at para [[29], where it was held that;

"In sum therefore, the Labour Court has the power under section 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on i) the grounds listed in PAJA, provided the decision constitutes administrative action; ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or iii) in accordance with the requirements of the constitutional principle of legality, such being grounds "permissible in law"....."

See also *Ntshangase v MEC: Finance Kwa-Zulu Natal and Another* 2010 (3) SA 201 (SCA) at para [15]

⁷ "organ of state" means –

(a) Any department of state or administration in the national, provincial or local sphere of government

merely technical and irrelevant, and should not stand in the way of a determination of whether the award was reasonable.

- [11] The issues raised on behalf of Moodley in regards to the provisions relied upon in bringing this application before the Court are not merely technical. It is trite that in motion proceedings, one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit⁸. Equally unacceptable is any attempt by a party to make out a new case in heads of argument or from the bar. This point was re-emphasised by Zondo J in his dissenting judgment in *Nkosinathi Lawrence Khumalo and another v MEC for Education: Kwazulu-Natal*⁹, where he stated that;

"It is trite that in motion proceedings an applicant must make his or her case in the founding affidavit. A litigant who has not made his or her case in the founding affidavit cannot escape the consequences of that omission by making it in his or her heads of argument....."

- [12] To the extent that the Applicant had disavowed any reliance on section 158 (1) (h) of the LRA, the issue is whether there is a basis for the court to deal with the application in terms of section 145 of the LRA. Guidance in this regard is sought from the principles set out in *Gcaba v Minister for Safety and Security and Others*¹⁰, where the Constitutional Court stated that the applicant's pleadings contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. The Constitutional Court further held that:

"..... While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction....."

⁸ *Betlane v Shelly Court* CC 2011 (1) SA 388 (CC) para [29]

⁹ 2014 (3) BCLR 333 (CC) at para [87]

¹⁰ 2010 (1) BCLR 35 (CC) at paras [74] to [75]

[13] Central to Moodley's contentions was that to the extent that reliance on section 185 (1) (h) was now disavowed, the Applicant could not be allowed to rely on the provisions of section 145 of the LRA as only in the supplementary affidavit¹¹ and in the replying affidavit¹² was there any indication that reliance was ever placed on the latter provisions. It was submitted on her behalf that the other references to section 145 of the LRA were merely made in the written heads of argument, and to the extent that this was the case, the Applicant sought to rely on a new cause of action.

[14] Moodley in her written heads of argument correctly acknowledged that the application before the court clearly conflated the issues as should have been brought under the provisions of section 158 (1) (h) and those ordinarily brought under section 145 of the LRA. In interpreting the pleadings, including not only the formal terminology of the Notice of Motion, but also the content of the founding, supplementary, answering and replying affidavits, it is my view that despite the conflation of issues, the legal basis of the Applicant's claim is to a large extent founded on the provisions of section 145 of the LRA. My conclusions in this regard are fortified by the following;

14.1 Despite reference to section 158 (1) (h) of the LRA in the Notice of Motion, in the same vein, prayer 1 seeks that the arbitration award be reviewed and set aside.

14.2 Prayer 3, which would ordinarily be competent under the provisions of section 158 (1) (h) of the LRA is sought in the alternative, and has since been abandoned as a result of section 158 (1) (h) being disavowed.

14.3 In the founding affidavit deposed to by Mngomezulu on behalf of the Applicant, it was stated under **PURPOSE OF THE APPLICATION:** that;

"The purpose of this application is to review and set aside the award that was made by the second respondent in favour of the third respondent dated 2 July 2012 in the Bargaining Council under case no

¹¹ P77, paragraph 15 of the indexed bundle

¹² P145, paragraph 39.2 of the indexed bundle

GPBC 992/2012 and further to review and set aside the decision of the fourth respondent dated 9 February 2012"

- 14.4 Under paragraph 30 of the founding affidavit, it was submitted that the Arbitrator committed gross irregularity (and the reasons are set out in sub-paragraphs 30.1 to 30.3)
- 14.5 In the supplementary affidavit deposed to by Majeke on behalf of the Applicant, an averment was made at paragraph 13 that the Arbitrator misconstrued his functions and powers in terms of the LRA. At paragraph 14 it is averred that the arbitrator's award was irrational and grossly unreasonable in the light of the seriousness of the charges; that the Arbitrator failed to perform his functions as required by the provisions of section 138, and that the award was grossly unreasonable.
- 14.6 At paragraph 15 of the supplementary affidavit, it is stated that the arbitrator's award was defective within the meaning of section 145 of the LRA and fell to be reviewed and set aside.
- 14.7 In her answering affidavit, Moodley had raised preliminary points in regards to the non-observance of the Rules of this Court, in particular, Rule 7A (6) read with Rules 7A (5) and (8); and the late delivery of the supplementary affidavit.
- 14.8 Moodley admitted in her response to the contention that the purpose of the application was to review and set aside the award. She had however denied that a case had been made out for the relief sought, and further denied that the Applicant sought to review and set aside the decision of the fourth respondent as a prayer in the notice of motion in that regard was in the alternative, and not in addition to the main prayer. She further pointed out no steps had been taken by the Applicant to review the Chairperson's decision until after the award was issued.
- 14.9 Moodley had responded to the averments made in regards to the reason the Arbitrator's award should be reviewed and set aside, and

accordingly defended the Arbitrator's decision by stating *inter alia* that the Arbitrator had acted appropriately and had not committed any errors.

- [15] In the light of the above factors as gleaned from the pleadings, it should be concluded that despite the Notice of Motion making reference to an incorrect provision, there is a legal basis for the Court to consider the matter under the provisions of section 145 of the LRA. There is no basis therefore for any conclusion to be reached that by disavowing the provisions of section 158 (1) (h), a new cause of action was now placed before the Court. The intention to review the award, *albeit* conflated, is prevalent throughout the Applicant's pleadings, and Moodley, in her answering affidavit, sufficiently dealt with any averments that pertain to the relief sought in regards to the arbitration award. To this end, I am satisfied that the application should be dealt with in accordance with the provisions of section 145 of the LRA.

(b) *Condonation:*

- [16] The award was issued on 2 July 2012, and the application was brought before the Court on 21 September 2012. In terms of section 145 (1) (a) of the LRA, a review application ought to have been brought within six weeks of the date that the award was served on the applicant. The application for review was filed some six weeks out of time. It is trite that on good cause shown, the Court may condone the non-observance of the time frames. The Court in considering whether or not to grant condonation exercises a discretion, taking into account the relevant factors identified in *Melane v Santam Insurance Co. Ltd*¹³ in the following terms;

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting

¹³1962 (4) SA 531 (A) at 532B-E

condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

[17] I have regard to the extent of the delay, which in my view is not excessive in the extreme. I have further had regard to the explanation proffered for the delay, which in my view is satisfactory. Crucially however is the prejudice to be suffered by the Applicant if condonation was not granted, especially in view of the circumstances that led to the dismissal of Moodley, the fact that she did not challenge the verdict of the chairperson, and the parties' prospects in respect of the main claim. In my view, considerations of justice¹⁴ in the light of the material circumstances of this case dictate that condonation should be granted.

[18] Further in the light of the above considerations, it is also deemed appropriate to condone the Applicant's non-compliance with the provisions of Rule 7A. Account is also taken of the First Respondent's late filing of the record in terms of Rule 7A (4) of the Rules of this Court on 27 November 2012, which was accompanied by an 'Explanatory Affidavit' in view of non-compliance with the time periods. The delay essentially was caused by the Arbitrator who had not responded to the First Respondent's repeated requests to file a record.

The review application:

[19] The background and circumstances under which the award was issued have been stated elsewhere in this judgment. The only issue for consideration before the Commissioner was whether the sanction of dismissal imposed on Moodley by the Applicant was fair. No oral evidence was presented before the Arbitrator as the issue for consideration was crisp. In the award, the Arbitrator simply made reference to *De Beers Consolidated Mines Ltd v CCMA and others*¹⁵, and stated that arbitrators are precluded from imposing the correct

¹⁴ See *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) at 839 F

¹⁵ (2000) 21 ILJ 105 (LAC)

sanction. He had concluded that the unilateral decision of the Applicant to change the chairperson's decision after Moodley had made an election to be demoted rendered her dismissal unfair.

- [20] The standard of review is now fairly well established. In considering whether an award should be interfered with, the test is that as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹⁶. The reviewing Court is required to enquire whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach on the material placed before him or her. In *Head, Department of Education v Mofokeng and others*¹⁷ the Labour Appeal Court, per Murphy AJA, held that:

"The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome"¹⁸.

- [21] The Arbitrator was required to make a determination as to whether the decision of the Director General to dismiss Moodley was fair or not. It being common cause that the chairperson's findings on the charges were not disputed, the enquiry ought to have focussed on the sanction of the dismissal as imposed by the Applicant. In my view, the Arbitrator's decision cannot fall within a band of reasonableness for the following reasons;

21.1 Arbitrators are required to determine whether a sanction of dismissal was fair, having had regard to a variety of factors, including those set out in Schedule 8 of the LRA.

21.2 In terms of the LRA, an arbitrator has to determine whether a dismissal is fair or not. An arbitrator is not given the power to consider afresh what he or she would do, but simply to decide whether what the

¹⁶ [2007] ZACC 22; 2008 (2) SA 24 (CC) at para 110

¹⁷ [2015] 1 BLLR 50 (LAC)

¹⁸ At para [30]

employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances¹⁹.

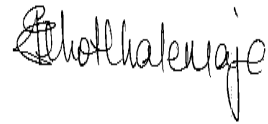
- [22] The arbitrator clearly failed to apply his mind to issues which were material to the determination of the case before him, and thus committed a reviewable irregularity. The issue before him was not whether he was required to impose a 'correct sanction' or not. To the extent that the Arbitrator approached the issue before him by reference to imposing the 'correct sanction', it follows that the Arbitrator failed to appreciate his mandate, and essentially misconceived the nature of the enquiry before him and invariably arrived at an outcome that did not fall within the band of reasonableness.
- [23] Ordinarily, in the light of the irregularity pointed out, and the circumstances that led to the dismissal, the court would be inclined to dispense of the matter, especially given the protracted history of this matter. This however is not an ordinary case in that what was before the Arbitrator for determination, and which is the subject of the review application was the decision of the Applicant to dismiss Moodley, and not the decision of the Chairperson. As already indicated elsewhere in this judgment, the provisions of section 158 (1) (h) of the LRA have been disavowed, and there is no basis for this Court to in any manner, determine whether the sanction of dismissal as imposed by the Applicant was fair or not, as to do so would be to countenance the circumvention of the very express provisions of the LRA disavowed by the Applicant.
- [24] I have had regard to considerations of law and fairness and I am of the view that a cost order is not warranted in this case. Accordingly, the following order is made;

¹⁹ *Sidumo* at para [79]. See also at para [78], where the Constitutional Court held that;

"In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."

Order:

- a) The arbitration award issued by the Second Respondent dated 2 July 2012 under case number GPBC992/2012 is reviewed and set aside.
- b) The matter is remitted back to the First Respondent to be heard *de novo* by an Arbitrator other than the Second Respondent.
- c) There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. W Mokhari SC with Adv. L Tsatsi

Instructed by: State Attorney

For the Third Respondent: Mr. Bradley Conradie of Bradley Conradie
Attorneys