



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2442/2014

In the matter between:

PORTIA MABUNDA

Applicant

and

ESKOM HOLDINGS LTD

COMMISSION FOR CONCILIATION, MEDIATION

First Respondent

AND ARBITRATION

Second Respondent

COMMISSIONER JS MAAKE N.O

Third Respondent

Heard: 6 October 2015

Delivered: 27 October 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an unopposed application to review and set aside an arbitration award issued by the third respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner held that the dismissal of the applicant by the first respondent was substantively fair.

Factual background

- [2] The material facts are recorded in the commissioner's award and I do not intend to repeat them here. The applicant's dismissal had its roots in a series of largely undisputed events in which the applicant, a human resources officer, received a proposed short list of candidates for a vacant post from the manager of the technical department concerned, a Mr. Strauss, and altered it by substituting the names of three candidates with three others, one of whom was her sister. It is common cause that the applicant's sister was interviewed and appointed, and that the applicant had no role in the interview and ultimate selection of successful candidates, other than her intervention in the shortlisting process.
- [3] At her disciplinary enquiry, the applicant was called upon to answer to two charges. The first related to an alleged failure to comply with the first respondent's policies, in that during March 2013, she acted irregularly during the recruitment and selection process by disqualifying candidates for a vacant post in favour of her biological sister who as a result, was employed by the first respondent. The applicant was also charged with misconducting herself in a way that is unacceptable in terms of the first respondent's values and ethics by first,

failing to declare the personal relationship with her biological sister (which was alleged to constitute a conflict of interest and secondly, that during the recruitment process, the applicant shortlisted her biological sister without declaring her relationship with her. It is common cause that the applicant was found guilty on the first charge, and dismissed on that basis.

The award

- [4] In the course of the arbitration proceedings, the commissioner sought clarity on the nature of the charges brought against the applicant. He makes specific reference to this issue in his award and at paragraph [30], he says the following:

The formulation and structures of the charges are inelegant and confusing in that the disciplinary hearing notice speaks of misconduct 2.1, misconduct 2.35 and counts 1 and 2. It is therefore not clear whether or not the former two misconduct or stand-alone charges, separately preferred from the letter to or whether or not four separate charges were preferred against the applicant. What is clear however, is that according to page 2A of exhibit "A", the applicant was dismissed on misconduct 2.1, of having, during the period March 2013, acted irregularly during the recruitment and selection process, disqualified candidates in favour of her biological sister, who, as a result thereof, was appointed in the position of Officer Key Customer Relations.

- [5] The commissioner went on to confine himself to the question of whether or not the applicant had committed the misconduct described above, i.e. whether the applicant had committed misconduct by disqualifying other candidates in favour of her biological sister. He recorded the following as common cause:

[33] That according to the advertisement on pages 5 - 7 of exhibit "B", the closing date for applications for the job in question was 7th March 2013. That Ellen Mnisi [the applicant's sister] was not included in the candidate list, on pages 8-38 of the exhibit, for shortlisting purposes. That, by an email dated 8th March of that year, a day after the expiration of the application dead-line, she, the applicant, had asked\ told Ellen Mnisi to send her CV and that the latter accordingly obliged on the same date. That per an email by the applicant to

Strauss, dated the same date, the applicant informed Strauss of the substitution of three shortlisted candidates with three others, one of whom was Ellen Mnisi. That later, on the same date, by email to the applicant by Strauss, he furnished her with a shortlist of certain candidates. That by an email dated 11 March 2013, addressed to Strauss by the applicant, she confirmed to him the said substitution and asking him to respond thereto, to enable her to finalise the shortlist, to which he did not express an opinion. That throughout this, Strauss was not informed by the applicant and was therefore unaware that she and Ellen Mnisi were biological sisters and that, by email, page 67 of the exhibit, he recorded this fact.

[6] The commissioner concluded the following:

The long and short of the foregoing facts is that after the late unconventional submission of a C.V by the applicant's sibling directly to her, the applicant failed to disclose a potential conflict of interest to her line manager during the recruitment process as required by clause (f) of the applicable Recruitment and Selection Procedure, which is pages 41-2 of exhibit and what is more, proceeded to alter the shortlist compiled by Strauss, by substituting three shortlisted candidates, with three others and significantly so, one of whom was Ellen Mnisi, her sibling and at this stage, the risk of repetition, Strauss or her line manager, the human resources manager, had not been informed by the applicant and were unaware, that Ellen Mnisi was her sibling.

[7] The commissioner rejected the applicant's version in the following terms:

[35] The applicant denies that she disqualified other qualified candidates by the deletion from the shortlist and substitution thereof by others, one of whom was Ellen Mnisi, on the grounds that, those deleted from the shortlist, were already on posts, the level whereof was the same as the advertised post. The respondent was correct in disputing argument, on the basis that people apply for positions not only for promotion purposes but for other reasons as well.

[36] There hangs in the air, and inexplicable pungent with of a smell of suspicious coincidences in this matter, of which, in the absence of a plausible explanation by the applicant, lends credence to the respondent's case...

Grounds for review

- [8] The applicant does not articulate her grounds for review in precise terms. The founding affidavit, deposed to by an employee of the legal unit of the National Union of Mineworkers, simply reflects the three grounds of review established by s 145. What follows is a list of findings made by the commissioner, without any specific averment of the extent to which, if any, the findings are not supported by the evidence. The high water mark of the applicant's claim is that the commissioner 'based his findings on suspicions and speculations, and not on facts...'.
- [9] In the supplementary affidavit, to which the applicant deposed, incorporate grounds for review that appear to relate to alleged acts of misconduct and gross irregularity on the part of the commissioner in respect of specific findings made by him. I do not intend to traverse all of these findings but the gist of the applicant's complaint is that there is no evidence on record to justify them.
- [10] It is, of course, not permissible for an applicant in proceedings such as the present to make out a case in the heads of argument, but much is made in the heads of the fact that contrary to the content of the charge on which the applicant had been dismissed and the basis on which the dismissal had been upheld by the commissioner, the applicant did not disqualify other qualified candidates. The applicant contends that she simply held the view that because there were not appropriate candidates for the positions, not because they do not have the qualifications required for the post, but because appointment to the post would not have any benefit for them as they were already on the same salary scales in the positions that they held, she did no wrong. This is particularly so after Strauss, having read a recommendation, removed the candidates from the shortlist. All the applicant says that she did was to express a view, which she contends does not amount an act of misconduct.
- [11] In short, the case to be gleaned from the papers is that the commissioner's findings are not sustainable by reference to the evidence that served before him.

Analysis

- [12] The grounds on which this court is entitled to interfere in a commissioner's award are well-established. This court may set aside an award if and only if the award represents a decision to which no reasonable decision-maker could come on the available material. Insofar as the applicant relies on what is contended to be a gross irregularity committed by the commissioner, it is incumbent on the applicant not only to establish the existence of a reviewable irregularity, but also to establish that notwithstanding the commissioner's conduct, the result of the proceedings falls outside of a band of decisions to which reasonable people might come. This test serves to preserve the distinction between a review and an appeal. In *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA), the Supreme Court of Appeal made clear that for a defect in the conduct of proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(i), the commissioner must have misconceived the nature of the enquiry or arrived at an unreasonable result. The court emphasised that material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside. It is only if their effect is to render the outcome of the proceedings unreasonable that these factors are of any consequence (at paragraph 25 of the judgment). In the circumstances, it is not sufficient in an application such as the present simply to assert that an arbitrator failed to attach sufficient weight or relevance to particular facts, or incorrectly attached weight and relevance to particular facts. An applicant must establish either that the arbitrator misconceived the nature of the enquiry or arrived at an unreasonable result. Where an applicant asserts the latter (which is what the applicant in the present instance does) a case must necessarily be made that the result of the proceedings under review is one that a reasonable arbitrator could not reach on all of the material that served before the arbitrator.
- [13] The applicant's papers do not make out a case on this basis. The applicant contests a series of factual findings made by the commissioner and the

inferences drawn from those, and submits that these are not sustainable by the evidence that served before him. For the reasons stated above, the applicant's failure to aver and to establish that any misdirection on the part of the commissioner had the result of an unreasonable outcome serves to blur the distinction between an appeal and a review. The application stands to be dismissed for that reason alone.

- [14] Even if I were to afford the applicant's papers a generous reading and infer a basis for a reasonableness review, in my view, the result of the proceedings, in the form of a finding that the applicant had been fairly dismissed, cannot be described as unreasonable. During argument, the applicant's representative submitted that the commissioner had failed to appreciate that the applicant had been dismissed only in respect of what was referred to as misconduct 2.1, i.e. that she acted irregularly during the recruitment process by disqualifying other qualified candidates in favour of her biological sister. What the submission overlooks is that the commissioner was acutely alive to that issue. In paragraph 30 of the award, quoted above, he specifically records that he confines himself to the question of that misconduct and not the additional charges of conflict of interest or the applicant's failure to declare her relationship with a shortlisted candidate. At paragraph 35 of the award, the commissioner clearly rejects the applicant's version that she had disqualified certain candidates and substituted them with others, including her sister, on the basis that those disqualified were already in place at the appropriate level. The fact that Strauss acted on her recommendation is neither here nor there – the evidence clearly discloses that he relied and acted on her advice given the applicant's function as a human resources manager. In short, the evidence disclosed that the applicant received a proposed short list from Strauss, that she deleted the names of three candidates, two of whom she considered unsuitable because they were employed on the same level as the vacant post and one of whom she considered did not meet the minimum requirements, that she substituted three different candidates, one of whom was her sister, that she sent the revised list to the technical manager without disclosing the fact of her relationship with her sister, and that her sister

was subsequently employed by the first respondent. It was incumbent on the applicant in her capacity as an adviser on recruitment and selection to the first respondent's management to have acted with integrity. She failed to do so.

[15] In short, the applicant has failed to establish that the commissioner committed a reviewable irregularity or that the result of the proceedings fails to meet the reasonableness threshold. The application therefore stands to be dismissed.

I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: MES Makhinta, Makhinta Attorneys