



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: P 523/10

In the matter between

ZOLEKA LEVE

Applicant

and

GENERAL PUBLIC SERVICE BARGAINING

COUNCIL

First Respondent

COMMISSIONER DHLODHLO

Second Respondent

MEC OF SPORT, RECREATION

ARTS & CULTURE - EASTERNSCAPE

Third Respondent

Heard: 23 April 2015

Delivered: 11 December 2015

Summary: An arbitration award cannot be reviewed and set aside when the applicant has failed to establish that an award falls outside the bounds of reasonableness.

JUDGMENT

LALLIE, J

Introduction

- [1] In this application, the applicant seeks an order reviewing and setting aside the arbitration award of the second respondent (“the arbitrator”) in which she found the dismissal of the applicant substantively and procedurally fair. It is opposed by the third respondent.

Factual background

- [2] The factual background to this dispute is that the applicant was employed by the Department of Sport, Recreation Arts and Culture in the Province of the Eastern Cape (“the Department”) in 1984. She occupied the position of administrative officer when she was dismissed on 25 June 2009. The events leading to the applicant’s dismissal are that in 2009 the Department arranged Freedom Day celebrations to be held at Matatiele. Desirous of attending the celebrations, the applicant sought authority for the Department to pay for the hotel accommodation for her and a number of her colleagues. She was later charged with falsifying/defrauding the signature of the Head of Department (“HOD”) on a submission document dated 23 April 2009, misleading the pre-audit unit into processing the submission as an authentic document signed by the HOD, causing the Department to incur unauthorised expenditure in the amount of R4399.00 and making a false statement when required to account for the authorisation by the HOD to attend the celebrations. A disciplinary enquiry found her guilty of the first three charges and took a decision to dismiss her. Aggrieved by her dismissal she referred an unfair dismissal dispute to the first respondent where the arbitrator issued the arbitration award which the applicant seeks this Court to review and set aside.
- [3] The applicant delayed in filing her review application and applied for condonation. The condonation application is unopposed. The extent of the delay is 10 days. It can be attributed to her erstwhile attorney’s failure to prosecute the review application with the necessary diligence. As the extent of

the delay is minimal and its explanation is reasonable, I am of the view that the applicant has established the necessary grounds for her condonation application to succeed.

The arbitration award

- [4] In the arbitration award, the arbitrator summarized the evidence of witnesses. In determining whether the Department discharged the onus of proving the substantive and procedural fairness of the applicant's dismissal, the arbitrator conducted the enquiry as envisaged in item 7 of schedule 8 to the Labour Relations Act 66 of 1995 ("the LRA"). She considered whether the applicant breached a rule or standard of conduct, whether she was aware of the rule, whether the rule was reasonable, whether the Department was consistent in applying the rule and whether dismissal was an appropriate sanction. She noted that both the Department and the applicant submitted that the HOD did not approve the applicant's submission with a list of officials including herself requesting payment for accommodation in Matatiele for the Freedom Day celebrations but advised her to follow protocol. She considered the applicant's version that she left the HOD's response on her desk and went home frustrated at the end of the business day. She rejected it and her evidence that she was told by a colleague that her submission had been approved because she failed to call the colleague as a witness. She further rejected the applicant's evidence that the original signed submission was later found in the finance section because it was not proved. She accepted evidence on behalf of the Department to the effect that the applicant submitted a copy of her approved submission which was accepted with the understanding that she would submit the original document later. She failed to submit it and did not report for duty the following day. She found the Department's witnesses credible and accepted their version.
- [5] The arbitrator found that the reasonableness of the rule was not challenged. She rejected the applicant's defence of inconsistency because of her failure to substantiate it and the relevance of the role played by of her colleague who

also attended the Freedom Day celebrations. She found the sanction of dismissal appropriate because of the gravity of the misconduct which breached the trust relationship between the applicant and the Department.

Grounds for review

[6] The applicant's grounds for review are that the arbitration award is unreasonable. It is an award that a reasonable decision-maker could not reach. It is incompatible with the evaluation of the evidence on which it is purportedly based. It is unreasonable to the extent that an inference can be drawn that the arbitrator did not, either properly or at all apply her mind to her decision or failed to consider the evidence before her properly. In the supplementary affidavit, the applicant added further grounds. She submitted that the arbitrator committed a gross irregularity by unreasonably failing to attach due weight to the applicant's defence of inconsistency. She erred in concluding that the trust relationship had broken down irretrievably in the absence of evidence to that effect. She committed a further gross irregularity by irrationally attaching weight to the applicant's failure to call specific witnesses when she failed to attach the same weight to the Department's failure to call the HOD whose signature was forged as a witness. A further criticism of the award is based on the arbitrator's failure to assess the relevance of a portion of the Department's evidence. She failed to determine the credibility and probabilities of the Department's witnesses. She failed to consider that the pre-audit section applied the rule inconsistently as it approved a fellow employee's submissions without a letter from the HOD. The applicant submitted that the gross irregularities committed by the arbitrator deprived her of the right to a fair hearing in that she was not afforded an opportunity to have her evidence assessed fairly and properly.

[7] The third respondent opposed the application on the grounds that its witnesses discharged the onus of proving the substantive and procedural fairness of the applicant's dismissal. It submitted that the findings of the arbitrator are supported by the evidence which served before her. The finding that the sanction of dismissal was appropriate was correct in that the applicant persisted with her denial of having committed the misconduct which led to her dismissal and showed no remorse. Corrective discipline would therefore not be

effective. Contrary to the unsubstantiated allegations the applicant sought to rely on, a reading of the award proves that the arbitrator applied her mind to the evidence which served before her, evaluated it and took into account all the relevant factors. The third respondent submitted that the applicant's review is an appeal dressed as a review. It is the third respondent's case that the piecemeal approach the applicant adopted is impermissible and that she failed to prove valid grounds to have the arbitration award reviewed and set aside.

Analysis

- [8] The applicant submitted that her main ground for review is that her version that she left the document which was unsigned by the HOD on her desk was probable. She criticised the arbitrator for accepting circumstantial evidence by Ms Mona ("Mona") that the applicant forged the signature of the HOD instead of drawing a negative inference from the third respondent's failure to call the HOD as a witness. The third respondent correctly pointed out that the applicant's argument overlooks the reality that its evidence that the signature of the HOD was falsified was not in dispute. The third respondent's failure to call the HOD as a witness is therefore of no moment.
- [9] The applicant further argued that the arbitrator failed to consider some aspects of the case before her which clearly supported her case in evaluating the inherent probabilities of the versions before her. One such aspect was that Ms Ntebele ("Ntebele") approved submissions in respect of a group which did not include the applicant without requiring the approval of the HOD. The record reflects that Mona explained that the approval was granted in error by a newly appointed accounting clerk. Another aspect of the evidence which the applicant argued that the arbitrator failed to consider is that when Ntebele testified that she said "please give them the original letter if they want it" she knew that the original did not exist. Her evidence was, so went the argument, improbable. The submission is not supported by Ntebele's unchallenged evidence. The record reflects that when she made the comment she was not aware of the problem that the signature of the HOD had been falsified. She was told that the original document was needed and her natural response was that it should be supplied. A further aspect which proved the applicant's innocence but was not

taken into account by the arbitrator is that the logical conclusion to be drawn from Mona's evidence was that the applicant did not give her the required original document yet she continued to process the submission. The record reflects that Mona explained that when a submission entails a list of officials they did not insist on the original document as it may be attached to documents of one of those officials. She further explained that copies were sometimes accepted but before payment was effected the original document would be required. A further explanation was that the applicant presented her submission with a copy of the HOD's approval towards the end of the business day. The criticism is therefore not supported by the evidence tendered at the arbitration.

[10] The applicant's argument that the arbitrator failed to deal with the question of inconsistency has no merit. Although the arbitrator did not give elaborate reasons for rejecting the applicant's defence of inconsistency she considered it and gave reasons for rejecting it. The applicant's argument that the award is reviewable because the arbitrator's decision that the trust relationship between the applicant and the third respondent had broken down irretrievably has no substance. The enquiry into the substantive fairness of a dismissal includes a determination of the appropriateness of the sanction of dismissal. The arbitrator found that the gravity of the misconduct which led to the applicant's dismissal breached the trust which existed in the employment relationship and found the sanction of dismissal appropriate.

[11] The power of the Labour Court to interfere with arbitration awards is expressed in the following words in *Herholdt v Nedbank Ltd*¹

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before

¹ [2013] 11 BLLR 1074 (SCA) at para 25:

the arbitrator. 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, but are only of any consequence if their effect is to render the outcome unreasonable’.

In *Fidelity Cash Management Service v CCMA and Others*² the court sounded the reminder that in assessing the reasonableness or otherwise of an award of the CCMA, the reviewing court needs to be alive to the fact that the task of determining the fairness or otherwise of a dismissal is given to commissioners by the LRA. The court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*³ confirmed that in determining the reasonableness of an award the reviewing court needs to consider the totality of the evidence before the arbitrator and avoid a piecemeal approach.

- [12] The totality of the evidence before the arbitrator shows that the applicant wished to attend Freedom Day celebrations at Matatiele and have her hotel accommodation paid for by the Department as it had undertaken to pay for some officials. She was unaware that the undertaking to pay for some officials resulted from an error by a newly appointed accounting clerk. She made a submission which she submitted to the pre-audit unit. It was rejected. The applicant sought an explanation for the rejection from Mona, the state accountant at the pre-audit unit. She was told that her submission needed the approval of the HOD. Later the applicant presented the submission to Mona with a copy of the approval of the HOD. The submission was accepted and processed. The undisputed evidence of Tshetsha, the personal assistant to the HOD was that the HOD refused to approve the applicant’s submission and directed her to follow protocol as it was senior managers who were supposed to write to him. The submission was then returned to the applicant never to be presented for the approval of the HOD again. The applicant’s version was that after reading the response of the HOD she showed it to her colleagues and went home at the end of the business day. She was informed by a colleague

² [2008] 3 BLLR 197 (LAC)

³ [2014] 1 BLLR 20 (LAC)

the following day that her submission had been approved. She denied having presented an approved submission to Mona.

- [13] As the arbitrator was presented with two mutually exclusive versions she had to resolve the dispute of fact. In *Sasol Mining (Pty) Ltd v Commissioner Ngqeleni*,⁴ the court referred with approval to *SFW Group Ltd and Another v Martell et Cie and Others*⁵ where the court expressed the view that the technique for resolving a dispute of fact involves making findings on the credibility of factual witnesses, their reliability and probabilities. The purpose of the test is to ensure that commissioners apply their minds to the dispute of fact and reach informed findings on the issue. A reading of the award reflects that the arbitrator applied her mind to the dispute of fact. She considered that both the applicant and the third respondent submitted that the HOD did not approve the applicant's submission but advised her to follow protocol. Ntebele submitted that she withdrew her earlier submission and advised her staff that she could do nothing without the HOD's approval. The arbitrator made a finding that the applicant did not challenge Ntebele's version or submit convincing evidence on how the submission with the HOD'S approval landed at the pre-audit section despite its none approval. She further considered Mona's evidence that the applicant submitted a copy to her before knock off time with the understanding that originals would be submitted later and weighed it with the applicant's version that she left the HOD's response in her office and went home frustrated at knock off time. She noted that Mona's version was not challenged. She laid a considered foundation for her finding that the evidence of the third respondent's witnesses was credible and that it proved on a balance of probabilities that the applicant had breached the third respondent's rule.

- [14] An assessment of the reasonableness of the arbitration award proves that the arbitrator did not misconceive the nature of the enquiry. She made the correct enquiry into the fairness of the applicant's dismissal. The applicant failed to establish a defect in the award. The arbitration award falls within bounds of reasonableness. The review application can therefore not succeed.

⁴ [2011] 4 BLLR 404 (LC)

⁵ 2003 (1) SA 11 (SCA)

[15] In the premises, the following order is made:

15.1 Condonation of the late filing of the review application is granted.

15.1 The application for review is dismissed.

Lallie, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Ms Van Staden of the Justice Centre

For the Respondents: Advocate Simoyi

Instructed by: The State Attorney

LABOUR COURT