



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P377/2010

In the matter between:

NOKUZOLA NTSHONA

Applicant

~~and~~And

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

First Respondent

JOHN CHEERE ROBERTSON N.O

Second Respondent

MEMBER OF THE EXECUTIVE COUNCIL

DEPARTMENT OF HEALTH, EASTERN CAPE

Third Respondent

Heard: 10 October 2013

Delivered: 27 January 2015

Summary: The third respondent did not apply discipline inconsistently by issuing different sanctions to two employees who had breached the same rule. The difference is based on the gravity of the misconduct and the expression of remorse by only one of the employees.

JUDGMENT

LALLIE J

Introduction

- [1] This is an application to review and set aside an arbitration award of the Second Respondent (“the arbitrator”) in which he found the applicant’s dismissal substantively fair in that she had committed serious misconduct for which dismissal was the only appropriate sanction. It is opposed by the third respondent. The facts of this matter are mainly common cause. The applicant was employed by the third respondent as the Deputy Hospital Manager of the East London Hospital Complex (the ELHC) and Medical Superintendent of the Cecilia Makhiwane Hospital (CMH). After an interview in the SAFM, a national radio station in which she incorrectly reported that 400 of the deliveries at the ELHC were baby deaths, she was charged with four counts of misconduct. She was found guilty of the first three and dismissed. Aggrieved by her dismissal, she referred an unfair dismissal dispute to the first respondent where the arbitrator took the decision which is the subject matter of this application. During the course of the arbitration the first two charges against the applicant were withdrawn and she pleaded guilty to the remaining one, namely, the third which reads as follows:

‘It is alleged that you contravened a prescribed code of conduct by failing to comply with the provisions of East London Hospital Complex Circular no 5 of 2005 with regards to “Release Of Information to the media and National/International News Agencies” in that you allowed yourself to be interviewed on the radio as detailed in the table below, and made statements which caused the Department to be viewed in a negative light’.

Date: 15 August 2007, Media SAFM Radio Show.

Alternatively to allegation 3 it is alleged that you committed an act which is to the prejudice of the Department in that you allowed yourself to be interviewed on the radio as detailed in the table below made statements which caused the Department to be viewed in a negative light.

Date: 15 August 2007, Media SAFM Radio Show'.

- [2] The applicant sought to rely on a number of grounds the main being that the arbitrator failed to apply his mind to the matter before him leading him to reach an unreasonable decision. It is common cause that after the applicant had pleaded guilty to the third charge, the only issue before the arbitrator was the fairness of the applicant's dismissal for making herself guilty of the third charge and the appropriateness of the sanction of dismissal. It was submitted on behalf of the applicant that her dismissal was unfair in that the third respondent had applied discipline inconsistently by issuing her colleague, Dr Madiba, ("Madiba") with a verbal warning for committing the same misconduct which led to her dismissal. It was further argued that the arbitrator incorrectly recorded that Madiba was issued with a written warning for committing the same infraction as the applicant, an error which rendered the award reviewable. The error is inconsistent with documentary evidence and the "testimony of the respondent's only witness, Mr Mosana ("Mosana"), that Madiba was issued with a verbal warning.
- [3] Not every error committed by an arbitrator renders an award reviewable. Material errors of fact are not in and of themselves sufficient to render an award reviewable but are only of consequence if their effect is to render the outcome unreasonable. See *Herholdt v Nedbank Ltd*¹. When all the facts that were before the arbitrator are considered it becomes clear that the error had no effect on the outcome of the arbitration because the principle is materially the same. It is that one employee was issued with a warning while another was dismissed for the same infraction. The fact that the arbitrator referred to the warning as written instead of verbal is, in the circumstances of this matter of no moment. The fundamental difference remains. Madiba was issued with a sanction less than dismissal but the applicant was dismissed.

¹ [2013] 11 BLLR 1074 (SCA).

- [4] Pursuing the argument that the third respondent exercised discipline inconsistently, counsel for the applicant, argued that the applicant and Madiba spoke to the media in contravention of the same circular. Mosana conceded that what constituted misconduct in terms of the circular was mere communication with the media without the permission of the Department and not the correctness or otherwise of the information disclosed to the media. He further conceded that the statements Madiba made were not true. The only difference between the two cases therefore, so went the argument, was that Madiba apologized shortly after committing the misconduct while the applicant tendered her apology at the arbitration. The arbitrator however, recorded that Madiba was given a written warning because he apologized and showed remorse.
- [5] It was argued on behalf of the third respondent that the applicant had failed to prove the existence of contemporaneous inconsistency because the applicant was dismissed for lying on the SAFM radio show of 15 August 2007 about the number of babies who died at the ELHC. She claimed that 400 babies died at the two hospitals monthly when the figure was in the region of 20 babies a month. She was aware or should have been reasonably aware of the correct information but lied deliberately. When she was told about the inappropriateness of her conduct that she had failed to follow the correct protocol, she was unrepentant and maintained that she was telling the truth. It took her two years to apologise through an affidavit which had been prepared by her attorneys. Madiba complained in the media about the shortage of beds for patients. When he was told that plans had been made to provide the beds he apologized promptly.
- [6] The third respondent argued that the parity principle has to be applied with caution. It is a general principle of fairness and should not be applied rigidly. An employee who falls to be dismissed may not merely claim that because some other employee had not been dismissed, he should also not be dismissed on the grounds of the parity principle. See *SACCAWU and Others v Irvin and Johnson Ltd*². The applicant relied on a number of decisions in

²(1999) 20 ILJ 2302 (LAC).

support of her argument of inconsistency. Her argument, however, overlooked an important part of the principle of parity, that the gravity of the misconduct should always be taken into account. When the gravity of the false allegation made by the applicant bearing her position in mind, that 400 babies died monthly at the ELHC is considered, the complaint made by Madiba pales into insignificance. The reaction of each employee after it has been brought to his or her attention that he or she has committed misconduct counts. Madiba was remorseful and apologised but the applicant did not but pursued her lies. It can therefore not be said that the two employees were treated differently. The reality is that the gravity of the misconduct they committed is different.

- [7] The applicant submitted that in finding her guilty of bringing the reputation and image of the ELHC and the Department into disrepute in the eyes of the public, the arbitrator failed to consider that the charge was an alternative to charge 3 which the applicant had not pleaded guilty to, it was therefore not before the arbitrator. This argument has no basis because charge 3 provides that the statements made by the applicant caused the Department to be viewed in a negative light. Causing the Department to be viewed in a negative light means that she put the name of the Department in disrepute. There is no real difference, it is just a question of semantics. The arbitrator cannot be criticised for his basis for the conclusion that the applicant caused the Department to be viewed in a negative light.
- [8] In determining whether there are grounds to have the arbitration award reviewed and set aside, the review court needs to consider whether the decision reached by the arbitrator, based on the evidence before the arbitrator is one which a reasonable decision-maker could not reach. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³. In the same judgment it was held that it is for the commissioner, based on the commissioner's sense of fairness, to determine, having considered all relevant circumstances, whether a dismissal is fair. The court held as follows at paragraph 78:

‘In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will

³ [2007] 12 BLLR 1097 (CC)

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.'

- [9] When the totality of the evidence before the arbitrator as well as the arbitration award is considered, it becomes clear that the arbitrator did precisely what he was required to do when arbitrating the dispute before him. Although the applicant had pleaded guilty to misconduct which involved her giving information to the media on 15 August 2007, the arbitrator cannot be faulted for looking at the act of misconduct against the background that the applicant had been warned against making herself guilty of the same misconduct before because he was required to consider all the evidence before him and the totality of the circumstances of the misconduct. He considered the gravity of the misconduct of publishing that about 60% of the total deliveries at the ELHC were baby deaths. He took into account the effect of the misinformation on the third respondent and the community it serves as well as the applicant's position. Her disregard for the correct information and counsel was also taken into account. The applicant's submission that the policy is silent on the sanction for its breach does not make the award susceptible to review as there is no duty on any employer to provide a closed list of acts of misconduct as well as the sanction to be meted out in the event of their commission. The arbitrator's duty, which he fulfilled, was to consider all the circumstances of the case before him in determining the appropriateness of the sanction. The applicant argued that the arbitrator's finding on the appropriateness of the sanction of dismissal had no legal basis. In *Sidumo (supra)* the court made it abundantly clear that it is the arbitrator's duty to determine the fairness of a sanction. It forms part of the fairness of the dismissal. The arbitrator considered the evidence before him and exercised his power to make a finding

on the appropriateness of the sanction. He based his finding on the evidence that the applicant was a Superintendent of one of the hospitals and a Deputy Hospital Manager of the ELHC which included the other. She inflated the figure of baby deaths by about 19 times and communicated such misinformation to the nation at large including the community the hospitals serve. She had been told to desist from making the incorrect figures public. The arbitrator dealt with the issue before him, considered the evidence and reached a reasonable decision. None of the errors the applicant pointed out led the arbitrator to reach an unreasonable decision. As the arbitration award falls within bounds of reasonableness, I could find no grounds to interfere with it.

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

10.1 The application for review is dismissed.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant: Advocate Simoyi

Instructed by: Heshula Attorneys

For the Third Respondent: Advocate Gqamana

Instructed by: The State Attorneys

LABOUR COURT