



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PR 90/13

In the matter between:

DEPARTMENT OF ROAD AND PUBLIC WORKS

EASTERN CAPE PROVINCE

Applicant

~~and~~ And

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL (GPSSBC)

First Respondent

ADVOCATE MHLONGO N.O.

Second Respondent

AYANDA TIWANE

Third Respondent

Heard: 5 August 2014

Delivered: 13 February 2015

Summary: The responsibility of determining the fairness of a dismissal lies with the arbitrator. When the arbitrator has taken a decision which falls within bounds of reasonableness the Labour Court will refuse to interfere with it.

JUDGMENT

LALLIE, J

- [1] This is an application to review and set aside an arbitration award of the second respondent (“the arbitrator”) in which he found the third respondent not guilty of sexual harassment and ordered his reinstatement retrospectively. It is opposed by the third respondent.

Factual background

- [2] The third respondent was employed by the applicant as a Manager Technical Services at the Alfred Nzo Region. Mrs Nkenjane (Nkenjane), a Control Works Inspector who was the third respondent’s subordinate filed sexual harassment complaints against him in July and August 2010. The complaints were investigated; consequently, the following charge was preferred against the third respondent:

‘That you contravened annexure A of the PSCBC resolution 1 of 2003, in that, on or during the year 2010 and at or near Kokstad in the Alfred Nzo Region of the Department, you sexually harassed Mrs Nkenjane by saying to her “ezimpundu zakho zinkulu, iyahlutha nendoda yakho, kufuneka undivise nam” (translated as “your bums are big your man must be getting all satisfaction, let me taste them as well”).’

The chairperson of the disciplinary enquiry which had been instituted against the third respondent found him guilty of the charge and dismissed him. He challenged the fairness of his dismissal at the first respondent where the arbitrator issued the arbitration award which the applicant seeks this court to review and set aside.

The award

- [3] Analysing the evidence before him the arbitrator intimated that he was going to concentrate on the evidence relating to the misconduct the third respondent was charged with because it is what led to his dismissal. The arbitrator’s approach was correct because he had to determine whether the third respondent’s dismissal for the misconduct he was dismissed for committing was fair, based on his sense of fairness. The arbitrator considered Nkenjane’s evidence that the third respondent made the comment about her bums in February 2010, while she was in his office. Nkenjane reported a

misunderstanding between the third respondent and herself to Ms Mshweshwe (Mshweshwe) of the Employee Assistance Programme in August 2010. She wanted Mshweshwe to intervene by calling the third respondent and herself and persuade the third respondent to release her to another section. Mshweshwe told Nkenjane that she was hiding something and she revealed the issue of sexual harassment for which Mshweshwe asked her to submit a written report. Nkenjane filed two grievances of sexual harassment against the third respondent. One pertained to the comment made by the third respondent about her bums and the other involved an incident which took place in Bisho in 2009.

- [4] The arbitrator further noted that Nkenjane requested to be transferred from the third respondent's section but the third respondent refused. She then lodged the initial grievance because she wanted the matter to be resolved amicably so that she could be transferred to professional services and the problem resolved with the intervention of two elderly people but the third respondent refused to participate. She further expressed her wish for justice to be done. Nkenjane was transferred after she had lodged the grievance. The arbitrator rejected Nkenjane's version that the third respondent made the comment about her bums because she failed to call as witnesses her colleagues in whose presence, on the applicant's version, the comment was sometimes made and Mshweshwe to whom she reported the alleged sexual harassment. He accepted the third respondent's version who denied having made the comment and stated that he only complemented Nkenjane about her beauty on her return from maternity leave. He accepted the third respondent's evidence that Nkenjane reported the incidents because she wanted to be transferred to professional services. He further accepted the third respondent's evidence which was corroborated by a witness to the effect that the real problem was that the third respondent was trying to discipline Nkenjane who was under performing. The arbitrator found that Nkenjane failed to prove her case on a balance of probabilities and ordered the third respondent's reinstatement. He also found that Nkenjane had achieved her objective of being transferred to professional services which led her to report her problem to Mshweshwe and not to the labour relations section.

Grounds for review

- [5] The applicant's first ground for review was that the applicant proved on a balance of probabilities at the arbitration that the third respondent committed sexual harassment against Nkenjane. Substantiating this submission, the applicant sought to rely on an incident which took place while Nkenjane and the third respondent were in Bisho on business. The Bisho incident does not assist the applicant because the third respondent, as the arbitrator correctly pointed out, was only charged and dismissed for the comments he made about Nkenjane's bums. A further attack on the award is mounted on the alleged unreasonable finding that the third respondent was not guilty of sexual harassment when the evidence of the remarks he made about her bums was not contradicted. It was submitted that evidence proved the third respondent's guilt and in disregard of such evidence, the arbitrator found that he did not make himself guilty of sexual harassment. The record reflects that the third respondent denied having made the comment. The denial constitutes contradiction of Nkenjane's evidence. The applicant submitted that the arbitrator committed a material misdirection in failing to analyse the overall evidence carefully having regard to the nature of sexual harassment as victims are reluctant to lay grievances against their harassers for fear of victimisation. Perpetrators are generally direct supervisors of victims as it was the case in the matter at hand.
- [6] An argument on sexual harassment generally was eloquently presented on behalf of the applicant. It, however, addressed the matter at hand superficially. In *Fidelity Cash Management Services v Commission for Conciliation Mediation and Arbitration and others*,¹ the court, interpreting the test for review in *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others*,² held that the test whether an arbitration award is reasonable is a stringent one that will ensure that awards are not lightly interfered with. The court further held that there is no basis to interfere on review with a decision that could have been reached by a reasonable decision-maker. The test is, therefore, whether the award falls within bounds of reasonableness. The

¹ (2008) 29 ILJ 964 (LAC) at para 100.

² 2008 (2) SA 24 (CC).

correct way to determine a review application is to consider the evidence before the arbitrator in its totality.³ Evidence reflects that the arbitrator dealt with the real issue before him which was to determine whether the third respondent had committed sexual harassment by making a derogatory comment of a sexual nature about Nkenjane's body. The arbitrator cannot be criticised for drawing a negative inference from Nkenjane's failure to call witnesses as it was her evidence that the third respondent made the derogatory remark often and in the presence of her colleagues and the third respondent had denied having made the comment. Further, his reasoning that Nkenjane was influenced by her need to be transferred from the third respondent's section is supported by Nkenjane and the third respondent's witness. Nothing turns on the arbitrator's comment that Nkenjane had obtained her goal of being transferred to professional services. Contrary to the applicant's argument, the arbitrator did consider the mutually exclusive versions he was presented with and gave reasons for preferring the third respondent's. A consideration of the evidence before the arbitrator reflects that he reached a decision which a reasonable decision-maker could have reached on the evidence before him and in the circumstances, I could find no reason to interfere with it.

[7] The third respondent sought a costs order against the applicant. Having considered the submissions made on behalf of the applicant and the third respondent on the question of costs as well as the provisions of section 162 of the Labour Relations Act 66 of 1995, I am satisfied that considerations of the law and fairness require that a costs order be granted against the applicant. The third respondent did not act unreasonably in opposing this application armed with an arbitration award in his favour in an attempt to protect his right to reinstatement.

[8] In the circumstances the following order is made:

³ . See *Gold fields Mining SA (Pty) Ltd v CCMA and Others* [2014] 1 BLLR 20 (LAC).

8.1 The application for review is dismissed with costs.

Lallie J

Judge of the Labour court of South Africa

Appearances

For the applicant: SC Gqamama

Instructed by: The State Attorney

For the respondent: Advocate Smith

Instructed by: Mgweshe Ngqeleni Attorneys

LABOUR COURT