



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

CASE NO: P 667/10

In the matter between:

FIKILE DAVID XHOTYENI

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

NTOMBEKHAYA SESANI N.O

Second Respondent

BUFFALO CITY MUNICIPALITY

Third Respondent

Heard: 20 February 2014

Delivered: 24 February 2015

Summary: Errors made by arbitrators do not necessarily render their awards susceptible to review when they have no effect on the reasonableness of those awards.

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 applicant’s dismissal both reasonable and fair and upheld the third respondent’s decision to dismiss him. The review application and the answering affidavit were filed late and condonation for the delay was sought. Both parties indicated that they were not opposing each other’s condonation applications. I however, considered both applications and I am satisfied that in both, good cause has been shown and granted them. The applicant withdrew the point in *limine* which he initially raised challenging the *locus standi* of the deponent to the third respondent’s opposing affidavit.

Factual background

- [2] The applicant was employed by the third respondent as transport coordinator. He was spotted by members of the Buffalo City Municipality (“BCM”) leaving the Cambridge solid waste area in a van on which five 25 litre containers filled with diesel which had been dispensed from the fuel tank on site were loaded. He was travelling with a fellow employee. He drove to his house where his fellow employee off loaded the diesel. The members of BCM who followed him found diesel in three 25 litre containers in his garage. When he could not give a reasonable explanation for being in possession of the diesel which was the property of the third respondent, he was arrested. He was subsequently subjected to a disciplinary enquiry for theft of 125 litres of the third respondent’s diesel. Having been found guilty of the misconduct, he was dismissed. He referred an unfair dismissal dispute to the fifth respondent where the arbitrator took the decision which is the subject matter of this application.

The arbitration award

- [3] The Commissioner found it common cause that 125 litres of diesel which was the property of the third respondent was found in the applicant’s house. She accepted the unchallenged evidence of Mr Mtshengu (“Mtshengu”) who was with the applicant when the diesel was discovered that he dispensed and off

loaded it on the instructions of the applicant. She consequently accepted that the third respondent was justified in not taking disciplinary action against Mtshengu for his role in the matter. She also rejected the applicant's submission that Mtshengu was part of a conspiracy to dismiss him as the conspiracy theory was not put to Mtshengu. The applicant did not have the requisition document to be in possession of the diesel. She accepted the third respondent's vision that the applicant said that he was going to write out the requisition. She rejected the applicant's testimony that the requisition was with Mr Gqizana ("Gqizana") as Gqizana could not have left with the requisition which he was not going to use after requesting the applicant to make arrangements for him to get fuel. She added that had the applicant's version been true, he would have told the BCM police that Gqizana had the requisition which justified his possession of the diesel. The Commissioner found the applicant's dismissal procedurally fair as she was satisfied that the consultation the applicant sought to rely on had nothing to do with other people or the third respondent's management. The initiator's omission to present aggravating circumstances did not change the nature of the serious charges which had been levelled against the applicant. She found that any chairperson would have recommended dismissal. The Commissioner's conclusion was that the applicant's dismissal was reasonable and fair.

Grounds for review

- [4] The applicant sought to rely on more than ten grounds of review. He submitted that the award stands to be reviewed and set aside as the arbitrator committed misconduct in the discharge of his functions or she committed irregularities which are reflected in her findings of fact and conclusions of law. Those irregularities include the arbitrator's disregard of relevant and material evidence and abrogating the fundamental responsibility of assessing the totality of the evidence before her in a fair and balanced manner. She consequently denied the applicant the right to a fair hearing. Her decision that the applicant's dismissal was fair is not supported by the evidence before her. She wrongfully rejected the applicant's version. She erred in finding the applicant guilty of the misconduct which led to his dismissal and made a gross

mistake of law and misconstrued the evidence before her. The applicant attacked the award also on the basis that the arbitrator failed to lend a helping hand to his inexperienced representative and himself when it was clear that they were in need of her assistant. She failed to apprise him of his rights including his right to documents he sought to rely on which were in the third respondent's possession. She also violated his right to cross examination by insisting that it be exercised through his representative only.

- [5] The applicant's submissions were opposed by the third respondent on the basis that when the test for review is considered the applicant established no basis for the award to be reviewed and set aside.
- [6] A reading of the record does not support the applicant's allegation that his colleague who represented him was inexperienced and lacked the capacity to present his case. His representative stepped in after the shop steward who had represented the applicant earlier was suspended. Neither the applicant nor his representative informed the commissioner that the latter lacked the necessary ability. The alleged limited ability of the applicant's representative is not apparent from the record so are its consequences. Amongst the applicant's main grounds for review is the arbitrator's failure to exercise the power bestowed on her when conducting arbitrations. That obligation is summarised as follows:

'A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable...'¹

The court further held that the piecemeal approach in dealing with awards is improper. The totality of the evidence has to be considered and thereafter a decision taken whether the decision made by the arbitrator is one that a reasonable decision-maker could make. Another finding of *Goldfields*² which I find apposite is that the argument that failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable for it to render an award reviewable. The applicant

¹ *Goldfields Mining SA (Pty)Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC) at paragraph 16

² *Supra*

failed to demonstrate how the errors made by the arbitrator and her alleged failure to take into account certain parts of the evidence made her award susceptible to review. Nothing turns on the arbitrator's insistence that the applicant exercise his right to cross-examine witnesses through his representative. It is an acceptable part of ensuring that the arbitration is conducted in an orderly manner.

- [7] The court made it abundantly clear in *Fidelity Cash Management Service v CCMA and Others*³ that the test for review is a stringent test which will ensure that arbitration awards are not lightly interfered with. It further reminded the review court that the task of determining the fairness or otherwise of dismissal has been bestowed to the CCMA by legislation. The question whether the review court would have reached a decision different from the arbitrator's is irrelevant in determining the reasonableness of an award.
- [8] I have considered the submissions made on behalf of both parties and the authority that both counsel sought to rely on. An assessment of the evidence before the arbitrator when viewed in its totality reflects that she considered the principal issue before her which was the fairness of the applicant's dismissal. She evaluated the facts before her, identified the mutually exclusive versions presented by the parties and gave reasons for preferring the one presented by the third respondent over the applicant's. She also dealt with the inherent probabilities of the case and eventually arrived at a decision which a reasonable decision-maker could make on the evidence before her.

- [9] In the premises, the following order is made:

9.1 The application for review is dismissed.

Lallie J

Judge of the Labour Court of South Africa

³ [2008] 3 BLLR 197 (LAC); also (2008) 29 ILJ 964 (LAC).

APPEARANCES

For the Applicant: Advocate Booï

Instructed by: Siwisa Attorneys

For the Third Respondent: Advocate Le Roux

Instructed by: Smith Tabata Incorporated

LABOUR COURT