



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P309/12

In the matter between

M Y BHATTI

Applicant

and

PUBLIC HEALTH SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

First Respondent

COMMISSIONER MBULI N.O

Second Respondent

MEC DEPARTMENT OF HEALTH: EASTERN CAPE

Third Respondent

DEPARTMENT OF HEALTH: EASTERN CAPE:

Fourth Respondent

Heard: 26 August 2014

Delivered: 26 June 2015

Summary: An arbitration award which is not based on the evidence tendered at the arbitration is reviewable.

JUDGMENT

LALLIE J

- [1] In this application, the applicant seeks an order reviewing and setting aside the arbitration award of the second respondent who I will refer to in this judgement as the arbitrator. The application is opposed by the third and fourth respondents who I will refer to in this judgement as the respondents. The facts of this matter are that the applicant was employed by the respondent is a Principal Medical Officer from 1 October 1993 until his dismissal on 9 September 2011. On dismissal, the applicant was a full-time employee of the respondents performing his duties as a doctor at the Dora Nginza Hospital, one of the hospitals which form part of the PE Hospital Complex.
- [2] Owing to allegations of misconduct against the applicant, the respondents preferred the following charges against him:

- '1 You committed fraud in that you had claimed payment of remuneration in respect of hours worked in circumstances where those hours were not actually worked and/or were duplicated;
- 2 Fails to carry out a lawful order or routine instruction without just or reasonable cause in that you refused to be allocated to Dora Ngiza Hospital Casualty section;
- 3 Prejudiced the administration or efficiency of the Department by speaking to the media with regard to issues affecting the PE Hospital Complex;
- 4 Alternative charge: you contravened the prescribed code of conduct for the public service by speaking to the media with regard to issues affecting the PE Hospital Complex'.

- [3] The applicant was found guilty of having committed the misconduct referred to in all three charges. He was dismissed and challenged the substantive 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 applicant's grounds for review are that the arbitrator committed gross misconduct and gross irregularity with regard to the conduct of the arbitration proceedings and rendered an unjustifiable and unreasonable award. He ignored or failed to attach proper weight to the evidence before him in reaching

the finding that he was guilty of fraud and insubordination. He failed to take into account the relevant legal principles when dealing with the appropriateness of the sanction of dismissal. A further attack on the award is based on the arbitrator's failure to take into account that the evidence of the respondents' only witness was not specific. He failed to apply the cautionary rule. The applicant submitted that the arbitrator was biased, failed to order that the respondents produce registers which he needed, failed to take into account that the rape crisis centre where he worked when he is alleged to have refused to work at casualty is part of the casualty department. He did not take into account that no evidence was led to prove that he had made himself guilty of the misconduct which led to his dismissal.

- [4] The respondents denied that the award is unreasonable. They submitted that although Dr Vehbi was a single witness his evidence was found admissible by the arbitrator who recorded that he presented clear and coherent evidence which was not disputed by the applicant. With regard to the respondents' decision to lead only one witness the arbitrator found that although the evidence was uncorroborated it stood out to be the true reflection of what happened at the time the misconduct was committed. The respondents further submitted that the grounds the applicant sought to rely on were devoid of substance and merit and his application stands to be dismissed.
- [5] This court may review and set aside arbitration awards if they are unreasonable. An arbitrator commits a gross irregularity which justifies the reviewing and setting aside of the award when he or she has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner in deciding the fairness of a dismissal. *Herholdt v Nedbank Ltd and Others*¹. An arbitration award may be set aside on the grounds that it is unreasonable when it constitutes a decision which a reasonable decision-maker could not reach on the facts before the arbitrator. *Gold Fields Mining SA (Pty) v CCMA and Others*². The court further found that in determining the reasonableness of an arbitration award, the reviewing court must consider the totality of the evidence,

¹ [2013] 11 BLLR 1074 (SCA) at para 20

² [2014] 1 BLLR 20 (LAC).

ascertain whether the arbitrator considered the principal issue, evaluated the facts presented and came to a reasonable conclusion.

- [6] The applicant's case is mainly based on gross irregularities committed by the arbitrator in the conduct of the arbitration proceedings. There is merit in the applicant's submission that the arbitrator's decision that the dismissal was substantively unfair is not supported by the evidence before him. In reaching the decision that the applicant had made himself guilty of fraud he stated as follows in paragraph 33 of the award:

'He stated that what the applicant did cannot be monitored and amounted to fraud on the part of the applicant because he was paid for the duties that he did not perform but were possible performed by someone else. The argument of the employer in this regard makes perfect sense and the conduct of the applicant amounted to fraud at least on a balance of probabilities and cannot be condoned especially in the public health environment in which the applicant was working'.

- [7] The arbitrator's finding overlooks that the respondents' allegation of fraud against the applicant is based on his conduct of receiving remuneration in respect of hours worked in circumstances where those hours were not actually worked and/or were duplicated. Having accepted that the hours were actually worked and not duplicated the arbitrator had no basis to find the applicant guilty of fraud. The arbitrator's finding is not based on evidence which supported the charge which had been preferred against the applicant. After accepting that the hours were worked and not duplicated the only reasonable conclusion that could be reached on the evidence based on the charge was that the applicant did not make himself guilty of fraud. The arbitrator was not at liberty to find the applicant guilty of fraud not related to the one he was charged with and dismissed for as he had to determine the substantive fairness of the applicant's dismissal for the reasons which led to his dismissal.

- [8] When evaluating evidence tendered in connection with the charge of insubordination, the arbitrator considered evidence led on behalf of the respondents to the effect that the applicant failed to sign the attendance register on 4 January 2010, Dr Vehbi did not find the applicant at the casualty

when he called and physically went to the casualty looking for the applicant. He concluded that the applicant committed insubordination as, from the evidence led, it was clear that the applicant did not report for duty at the casualty as instructed without valid reason. The arbitrator omitted to evaluate the applicant's evidence on the charge. The applicant's unchallenged vision was that on the day in question he worked at the rape crisis centre at the request of a junior doctor who requested to swap with him. Dr Vehbi conceded that the rape crisis centre forms part of the casualty section of the Dora Nginza Hospital. The applicant's undisputed evidence was therefore that on the day in question he performed his duties at the casualty. The arbitrator gave no reason for rejecting the applicant's unchallenged version and accepting the respondents' version which was challenged by the applicant. The unchallenged evidence before the arbitrator therefore was that the applicant worked at the rape crisis centre which is part of the casualty on the day in question. The conclusion that he did not report for duty as instructed without valid reason is not supported by the evidence that was led at the arbitration.

- [9] The arbitrator recorded that the applicant pleaded guilty to the third charge of liaising with the media and his defence that he did not know that what he was doing was wrong is not acceptable. He found that the employer witness presented clear and coherent evidence which was not disputed by the applicant even though not corroborated and stood out to be the true reflection of what happened during the time of the incident. This finding is a figment of the arbitrator's imagination because no evidence was led in respect of the third charge. Arbitrations are hearings *de novo*. An arbitrator can only base the decision whether an employee has committed an act of misconduct on evidence or admission tendered at the arbitration. The court in *Herholdt (supra)* referred with approval to the *dicta* that the *Sidumo* test will justify setting aside an award if the decision involves speculation by the commissioner and is disconnected with and unsupported by any evidence. As the arbitrator's decision that the applicant made himself guilty of charges one and two is unsupported by the evidence tendered at the arbitration and the third is based on the commissioner's imagination the arbitration award is unreasonable as it is

not a decision a reasonable decision-maker could reach on the facts before the arbitrator.

[10] This matter was not properly ventilated at arbitration and the record of the arbitration proceedings does not contain all the facts which would make it possible for the award to be substituted. The respondents acted unreasonably in opposing this application because it is clear that the gross irregularities committed by the arbitrator render the award reviewable. The respondents are therefore liable to pay the applicant's costs.

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

11.1 The arbitration award issued by the second respondent under case number PSHS 425 – 11/12 and dated 18 May 2012 is reviewed and set aside.

11.2 The matter is remitted to the first respondent to be arbitrated *de novo* by an arbitrator other than the second respondent.

11.3 The third and fourth respondent pay the applicant's costs jointly and severally one paying the other to be absolved.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Van Zyl of Francois Roux Attorneys

For the Third and Fourth Respondents: Advocate Dala

Instructed by: The State Attorney

LABOUR COURT