



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P 373/12

In the matter between:

NATIONAL HEALTH LABORATORY SERVICES

Applicant

and

NDILEKA PATIENCE DUBENI

First Respondent

COMMISSIONER NALEDI BISIWE N.O

Second Respondent

COMMISSION FOR CONCILIATION MEDIATION

& ARBITRATION

Third Respondent

Heard: 11 November 2014

Delivered: 9 September 2015

Summary: Errors made by an arbitrator when conducting an arbitration will not render the award reviewable if they have no effect on the reasonableness of the award.

JUDGMENT

LALLIE J

- [1] This is an application to review and set aside an arbitration award of the second respondent who I will refer to as the commissioner in this judgement. It is opposed by the first respondent. The factual background of this matter is briefly that the second respondent was employed by the applicant as a Human Resources Officer. Subsequent to her dismissal on 30 June 2011, she referred an unfair dismissal dispute to the third respondent. In her arbitration award dated 25 June 2012, the commissioner found the first respondent's dismissal both procedurally and substantively unfair and ordered her reinstatement with effect from the date of her dismissal. In this application the applicant seeks to have the arbitration award reviewed and set aside. The review application, the answering and replying affidavits were filed late and applications for condonation of the lateness were filed. I have considered the condonation applications and granted them as I am satisfied that both parties have shown good cause.
- [2] Giving reasons for her decision, the commissioner found that the applicant did not deny having dismissed the second respondent. It based its decision to terminate the first respondent's services on her alleged application to be boarded which had been approved by Alexander Forbes, the applicants Health Management Consultants. The applicant advised the first respondent in a letter dated 26 July 2011 that her services would be terminated on 30 June 2011. The commissioner concluded that the second respondent's services were terminated without notice as at the time she received the notice her services had already been terminated.
- [3] The commissioner found that amongst the reasons stated by the applicant for the first respondent's dismissal was incapacity owing to ill-health. She noted that guidelines for dealing with incapacity due to ill health in item 10 of schedule 8 to the Labour Relations Act 66 of 1995 ("the LRA") required the applicant to have investigated all alternatives short of dismissal including the possibility of securing alternative employment or adapting the duties or work

circumstances of the first respondent to accommodate her disability. The procedure includes giving the first respondent an opportunity to state a case in response to her contemplated dismissal. She found that the applicant had failed to follow the guidelines. She rejected the applicant's version that Alexander Forbes provided the basis for the first respondent's dismissal. She did not accept that the first respondent expressed, through her interaction with Alexander Forbes an intention to be boarded or have her contract of employment terminated. The first respondent merely applied for disability benefits from Alexander Forbes as the applicant had granted her sick leave without pay because she had exhausted her sick leave pay. The commissioner found the evidence that the first respondent was fit to work from May 2012 unchallenged. She concluded that the first respondent's dismissal was both procedurally and substantively unfair and ordered her reinstatement with effect from May 2012. She further ordered the applicant to pay the first respondent an amount of R20 050. 00 minus statutory deductions, which is equivalent to remuneration she would have earned had she been reinstated in May 2012.

- [4] The applicant sought to rely on a number of grounds in its attempts to have the arbitration award reviewed and set aside. The applicant submitted that the commissioner committed misconduct in relation to her duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings and exceeded her powers. She disregarded crucial evidence in reaching her decision. The evidence includes the information provided by the first respondent in her claim form to Alexander Forbes and her conduct which indicated that she did not see herself being accommodated in any other position. By virtue of her position, she should have made enquiries about alternative positions if she wanted one. Assistance granted by the first respondent when Ms Quluba was boarded and the explanation given by Mr Mbeleni on the completion of forms to Alexander Forbes which confirm the first respondent's wish to be boarded. She disregarded the applicant's evidence that it did not penalise the first respondent by not extending her sick leave with pay. The decision that the first respondent's dismissal was unfair was based on material which was not put to the applicant's witness. The commissioner drew an incorrect inference

from the approval of the first respondent's claim to Alexander Forbes. She incorrectly and contrary to the provisions of the LRA implied that the applicant was expected to keep the first respondent's position open indefinitely or retain the first respondent in its employ when she was unable to perform her contractual obligations owing to incapacity. The applicant further submitted that the commissioner disregarded evidence which favoured it. She failed to apply the probability test as well as the cautionary rule to evidence of a single witness. She failed to afford the applicant a fair hearing and reached an unreasonable decision.

- [5] In the supplementary affidavit, the applicant elaborated on some grounds it sought to rely on in the founding affidavit. It added further grounds which include the submission that the first respondent was an unreliable and untrustworthy witness whose evidence could not be trusted by the commissioner. The applicant expressed the view that the only conclusion which could be drawn from the first respondent's application to Alexander Forbes is that by her own admission she was not capable of working. It also submitted that the first respondent accommodated the applicant and complied with its duties in terms of the guidelines. The first respondent's evidence supported the view that she was permanently incapacitated or that she did not know when she would recover. The applicant attacked the award on the basis that in LRA form 7.11 the first respondent sought compensation but the commissioner granted her reinstatement without the necessary evidence justifying her decision. It submitted that the commissioner committed a gross irregularity by not taking into account that the first respondent requested termination of her services owing to incapacity. A further manifestation of the commissioner's misconduct in relation to her duties as an arbitrator, so the applicant submitted, was her failure to acknowledge that the first respondent was paid while on extended sick leave after exhausting hers and had a specialist appointed to assist her.
- [6] The first respondent opposed the application mainly on the basis that the applicant failed to establish grounds to have the arbitration award reviewed and set aside. She denied having applied for the termination of her services

based on incapacity owing to ill-health. She submitted that the commissioner correctly found that the applicant had failed to follow the guidelines for dismissal on the grounds of incapacity due to ill-health which are provided in schedule 8 to the LRA. She denied having applied for the termination of her contract of employment owing to ill-health and submitted that she only applied for disability benefits for her to be remunerated while she was unable to work. The applicant attacked the first respondent's defence in its replying affidavit.

- [7] Both parties were in agreement that the test for review is laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. It is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. It is trite that in determining the reasonableness of an arbitration award the reviewing court has to consider the totality of the evidence tendered at the arbitration. In *Goldfields Mining SA (Pty) Ltd v CCMA and Others*², it was held that asking the following questions assist in determining the reasonableness of an arbitration award:

'(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal of the dispute? (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'

- [8] A consideration of the totality of the evidence before the commissioner reflects that she afforded both parties before her full opportunity to present their cases. She identified the dispute before her correctly as whether the first respondent's dismissal for incapacity owing to ill-health was fair. For the reasons furnished below, I am satisfied that the commissioner understood the nature of the dispute before her and dealt with its substantial merits. A number of grounds the applicant sought to rely on are not supported by the

¹ [2007] 12 BLLR 1097 (CC)

² [2014] 1 BLLR 20 (LAC)

evidence which was tendered at the arbitration. Dealing with the substantial merits of the dispute the commissioner correctly found that the onus of proving the fairness of the first respondent's dismissal for incapacity owing to ill-health was on the applicant. The approach was correct, as she correctly pointed out in the award, it is the applicant that advised the first respondent in the letter dated 28 July 2011 that her employment had been terminated on 30 June 2011 and that she was no longer its employee. In determining the fairness of the first respondent's dismissal the commissioner found that the applicant failed to comply with the guidelines for dismissal for incapacity owing to ill-health provided in schedule 8 to the LRA. No evidence was tendered at the arbitration to prove that the applicant had followed the guidelines. The commissioner considered the applicant's submissions and expressed the view that key to the guidelines is the employer's duty to investigate all alternatives short of dismissal including the possibility of securing alternative employment, adapting the duties or work circumstances of the employee to accommodate the employee's disability and afford the employee an opportunity to state a case. She found that had the applicant investigated the matter properly and afforded the first respondent an opportunity to be heard, it might have considered the possibility of the applicant being able to perform an alternative occupation. Even in the present application the applicant only submitted that it complied with provisions of the LRA. It however failed to illustrate its compliance. The commissioner's decision that the applicant failed to follow the guidelines in schedule 8 to the LRA cannot be faulted.

- [9] A further ground the applicant sought to rely on was that the first respondent requested the termination of her services as she wanted to be boarded because of her inability to perform her duties. The record does not support the applicant's allegation that the first respondent requested to have her services terminated. The applicant was at pains to substantiate the allegation and sought to have the inference that the first respondent requested to have her services terminated drawn from certain facts which were presented at the arbitration. The commissioner correctly found that the first respondent completed a form which was an application for disability benefits. She gave

details for concluding that by completing the form the first respondent was not requesting to have her contract of employment terminated. The applicant submitted that it tendered evidence to the effect that when the insurer approved an employee's disability application, that employee's employment got terminated. It applied the same principle in terminating the first respondent's services. The commissioner gave reasons for finding the applicant's interpretation of the consequences of the completion of the application for disability benefits form. Her finding that the applicant neither requested to have her services terminated nor express a wish to be boarded is not unreasonable. She found that any advice or recommendation by Alexander Forbes did not preclude the applicant from complying with the schedule 8 to the LRA.

- [10] The applicant submitted that the commissioner incorrectly and contrary to provisions of the LRA expected it to keep the first respondent's position vacant indefinitely. A proper reading of the arbitration award does not support the allegation. The commissioner found that the applicant should have followed a fair procedure in dismissing the applicant by taking into account the recommendations by Alexander Forbes and the guidelines in schedule 8 to the LRA.
- [11] The commissioner considered the relief sought by the applicant. The first respondent correctly pointed out that the referral form does not constitute pleadings. Seeking compensation as relief in the referral form did not prevent her from seeking reinstatement at arbitration. The commissioner's decision to reinstate the first respondent is based on the evidence before her. A reading of the award reflects that she considered the issue and based her decision on the relevant authority.
- [12] The applicant sought to rely on errors the commissioner made in reaching her decision. Amongst the errors is the commissioner's finding that the applicant penalised the first respondent by granting a portion of her sick leave without pay. It further submitted that she committed misconduct in the manner in which she dealt with evidence. The applicant, however, failed to establish that the errors led the commissioner to reach an unreasonable decision. I am

satisfied that the commissioner considered the principal issue before her, evaluated the facts presented and reached a reasonable decision. The application for review can therefore not succeed.

[13] The first respondent sought a costs order against the applicant. The applicant acted unreasonably in proceeding with this application when it is abundantly clear that no valid grounds existed to have the arbitration award reviewed and set aside. The first respondent should therefore not be out of pocket for opposing the application.

[14] In the premises the following order is made:

14.1 The application for review is dismissed with costs.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Ram

Instructed by: Shepstone & Wylie

For the First Respondent: Advocate Thys

Instructed by: JA Gordon & Associates

LABOUR COURT