



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 552/11

In the matter between

NOMALINDE GLORIA BENGXESHA

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

PI DHLODHLO

Second Respondent

DEPARTMENT OF HOME AFFAIRS

Third Respondent

Heard: 19 March 2015

Delivered: 13 November 2015

Summary: An arbitration award will not be reviewed and set aside based on the arbitrator's errors which have no effect on the reasonableness of the award.

JUDGMENT

LALLIE J

Introduction

- [1] In this application, the applicant seeks an order reviewing and setting aside an arbitration award of the second respondent (“the arbitrator”). It is opposed by the third respondent. In the award, the arbitrator found the applicant’s dismissal both substantively and procedurally fair.

Material facts

- [2] The applicant was employed by the third respondent on 1 July 1988. She was dismissed on 26 August 2009 for making fraudulent entries in the national population register between 1 June 2007 and 30 June 2008. On dismissal, she was a senior administration officer at the Libode office of the third respondent. She challenged the fairness of her dismissal at the first respondent where on 30 June 2011, the arbitrator issued the award which the applicant seeks this Court to review and set aside. This review application was filed outside the six weeks statutory period. The record of the arbitration proceedings and the replying affidavit were also filed late. Condonation for the lateness was sought. The condonation applications were not opposed. I have considered them and could find no reason to decline them as the applicant showed good cause.
- [3] In the arbitration award the arbitrator noted evidence on behalf of the third respondent to the effect that there was a standard procedure which had to be followed when birth was registered in the population register. It required that a mother’s identity number, the clinic card and application forms be submitted at the office of the third respondent. The father’s identity number would be included in the form when he acknowledged paternity and when the child’s parents were married. The information is captured on the computer by officers of the third respondent who use secret passwords which they had to change

after every six months for security reasons. Birth registration documents are kept in the third respondent's offices. During the period 1 June 2007 and 30 June 2008, 2000 children were registered irregularly. The applicant's password was used for the registration. The irregularities included use of the mother's identity number only. Births were registered on the same day with mothers of different children having the same date of birth. On 4 June 2007, 18 such births were registered, 4 were registered on 5 June 2007, 9 on 6 June 2007 and 53 on 2 July 2007. On 1 June 2007 and 27 August 2007, 1981 October 10 was used as a mother's date of birth to register the birth of 346 children. On 4 October 2007, identity numbers of 2 mothers were used to register the birth of 101 children. When the birth of twins born on 4 April 2000 was registered, each twin had a mother with a different date of birth. The registration of some siblings reflects that their registration is fraudulent in that the period between their births is not probable. By way of example, in one family one child was born two months after the other. In another family the second child was born three months after the first and the fourth, two months after the third. Twins were registered as having been born 21 days apart. The third respondent's records therefore reflect that all these births were registered by the applicant.

- [4] The applicant denied having registered births fraudulently. Her evidence was that the Libode district office was small and without proper infrastructure. Any official could capture births on the computer system using her username if she had not logged off. She denied having signed a declaration to keep her username confidential. She, however, testified that she did not disclose it to her fellow employees. She maintained that in instances where a mother did not have a valid identity document, her date of birth could be used to register the birth of her children. She denied that a form had to be approved by her in her capacity as the supervisor before birth registration was captured. She explained that a possibility existed that it was used when she left the computer unattended without logging off. She used the biometric system which required her to log on the computer system using her fingerprint. The arbitrator also considered the evidence given by her witness who had joined the Libode office in May 2008.

- [5] Giving reasons for her decision, the arbitrator noted that the third respondent had the onus to prove the fairness of the dismissal. She accepted the third respondent's version that the applicant's password was used for the fraudulent birth registrations whose supporting documents could not be traced. She rejected the applicant's version that the system used for birth registration was unreliable. She found it highly improbable that more than 2000 births registered irregularly by the applicant would disappear and not be sent, in terms of the standard procedure, by courier to Head Office. She further rejected the applicant's explanation that other officials might have used her password when she did not log off on the basis that she had a duty to protect it. She found that she had failed to prove her defence. He found that the applicant breached a rule of conduct knowing that it fetched the sanction of dismissal and concluded that her dismissal was substantively and procedurally fair.

Grounds for review

- [6] The applicant submitted that the arbitration award stands to be reviewed and set aside because the arbitrator was biased. She committed a gross irregularity by her failure to consider all the evidence and arguments before her and to apply her mind to the facts of the case and the applicable law. She failed to consider and assess the evidence before her fairly and preferred circumstantial evidence led on behalf of the third respondent over the clear position of how the computer system worked which was presented on her behalf. Her conclusion that the respondent proved its case on a balance of probabilities was unreasonable and unjustified. She committed a further irregularity by disregarding closing arguments and authorities cited in them.
- [7] The test to be applied in determining review applications is whether the decision reached by the arbitrator is reasonable. An award becomes reviewable if it constitutes a decision which a reasonable decision-maker could not reach on the information before the arbitrator. In this regard see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. In her papers and argument the applicant sought to rely on a number of errors made by the arbitrator in the conduct of the arbitration. The correct approach in determining the

¹ 2008 (2) SA (CC).

reasonableness of an arbitration award is stated as follows in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*²:

‘[18] In a review conducted under section 145(2)(a)(c)(ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to a process -related irregularity sufficient to set aside an award. This piecemeal approach of dealing with the arbitrator’s award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make’.

- [8] The applicant adopted a piecemeal approach and sought to rely on every error she perceived the arbitrator to have made. Her review application appears to be an appeal dressed as a review. Her approach is impermissible. Not every error made by an arbitrator renders an award reviewable. Dealing with the issue of errors made by arbitrators in the conduct of arbitrations the court in *Herholdt v Nedbank Ltd*³ held thus:

‘[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2) (a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for the award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable’.

- [9] The totality of the evidence before the arbitrator shows that she considered the principal issue before her and evaluate the facts presented at the arbitration.

² [2014] 1 BLLR 20 (LAC).

³ [2013] 11 BLLR 1074 (SCA).

She gave reasons for accepting the third respondent's version and rejecting the one presented by the applicant. She gave reasons for finding that the third respondent had discharged the onus of proving the fairness of the applicant's dismissal. The applicant's argument that the respondent failed to prove that the applicant acted fraudulently is based on her piecemeal approach because when the award is read in its entirety the arbitrator's decision and reasons thereof are undoubted. She cannot be faulted for rejecting the applicant's version that between 1 June 2007 and 30 June 2008, 2000 births were registered by the applicant's colleagues using her password which she had not disclosed to them. The applicant did not establish that the error she sought to rely on led the arbitrator to reach an unreasonable decision. The arbitrator did not misconceive the nature of the enquiry before her. Her decision based on the evidence before her falls within bounds of reasonableness.

[10] The third respondent sought a costs order against the applicant. I am not convinced that the order should be granted because the applicant did not act unreasonably in bringing this application.

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

- 11.1 The late filing of the review application is condoned.
- 11.2 The late filing of the arbitration record is condoned.
- 11.3 The late filing of the replying affidavit condoned.
- 11.4 The application for review is dismissed.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Grobler

Instructed by: Brown, Braude & Vlok Inc Attorneys

For the Respondent: Advocate Gqamana SC

Instructed by: The State Attorney

LABOUR COURT