



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no: D 1116/2010

In the matter between:

PUBLIC SERVICE ASSOCIATION OF SOUTH AFRICA

First Applicant

MATHATO MOKHELE

Second Applicant

~~and~~ And

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

P PILLAY N.O

Second Respondent

DEPARTMENT OF HOME AFFAIRS: KWAZULU NATAL

Third Respondent

Heard: 12 November 2013

Delivered: 13 January 2015

Summary: Review of an arbitration award –Commissioner made reasonable findings – application for review is dismissed.

JUDGMENT

PRINSLOO, AJ

Introduction

- [1] The Applicant is seeking to review and set aside an arbitration award issued on 14 October 2010 and to substitute it with an order that the Second Applicant's (Mokhele) dismissal was unfair and that she be retrospectively reinstated.
- [2] The Third Respondent (the Department) opposes the application for review.

Brief exposition of the facts

- [3] The Applicant was employed as a data capturer for a period of three years, before she was dismissed in June 2007.
- [4] Mokhele wrote: *"I, Mokhele Mathuto work for the Department of Home Affairs as a data typist and I confess to have been taking presents from the agents, funeral parlours and marriage officers for quicker services. I know what I have done is wrong as I am paid by the Department to do my job and I am very sorry for that. I would like the Department to give me a second chance to prove myself and I promise that something of this nature will never happen again as I have learnt my lesson. I am apologising for the wrong things that I have done. I am also pleading with the Department to please give me a second chance I would do anything that the Department asks of me so that I can keep my job. I am really sorry. That is all I can say. Thank you."* (the confession)
- [5] In February 2007 a charge of misconduct was levelled against Mokhele in that she contravened the Code of Conduct for the Public Service in 2006 when she knowingly and unlawfully accepted compensation in the form of gifts from funeral parlours, marriage officers and agents for performing her duties. This was done in exchange for preferential service and was done without written approval from the Department.

- [6] Mokhele pleaded guilty at her disciplinary enquiry and she was subsequently dismissed.
- [7] The Applicant referred an unfair dismissal dispute to the First Respondent (GPSSBC) and the dispute was arbitrated on 26 September 2008, 23 October 2008 and 17 September 2010.

The arbitration proceedings and award

- [8] The Department called two witnesses and both testified about the Code of Conduct for the Public Service (Code of Conduct) and the fact that Mokhele was trained on the contents of the Code of Conduct.
- [9] Mr Dlamini on behalf of the Department testified that the practice is that the Department does not accept gifts from the public. The value of the gifts is irrelevant, as they do not accept gifts. Ms Maharaj, the Department's second witness, testified that Mokhele gone through an induction programme and she is familiar with the processes and contents of the Code of Conduct. She testified that Mokhele's conduct set out in her confession constituted a transgression of the Code of Conduct.
- [10] Mokhele testified that she wrote the confession because she was asked to do so by Monde Maqula and she apologised in her confession not to upset her boss any further. She pleaded guilty at her disciplinary enquiry because she was advised by her representative to plead guilty. In her testimony during the arbitration she said that what she did wrong was to accept a bribe.
- [11] The Second Respondent (arbitrator) upheld the sanction of dismissal and found Mokhele's dismissal substantively fair. She held that material aspects of Mokhele's case was not put to the Department's witnesses and that the Department's witnesses were not challenged on important and material aspects of their versions. The arbitrator found that the Department proved its case on a balance of probabilities.
- [12] On the appropriateness of the sanction the arbitrator held that she had to consider whether dismissal was an appropriate sanction out of a range of options and not whether it was the only appropriate sanction or option a

commissioner would have chosen. In evaluating the factors, the sanction of dismissal was upheld.

The test on review

[13] The test to be applied on review is well-established. A review application is not an appeal. The review court is required to determine whether the decision to which the arbitrator came falls within the bands of decisions to which a reasonable decision-maker could come on the available material. Any process-related conduct on the part of an arbitrator for example a failure to have regard to particular evidence, or the manner of the assessment of that evidence, is of no consequence unless it had the result of an outcome that is unreasonable.

[14] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*¹ the Supreme Court of Appeal held that:

“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 s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry 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 an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

[15] The test to be applied is a stringent one, concerned only with the question whether the decision of the arbitrator is reasonable.

Grounds for review

[16] The Applicant raised five main grounds for review.

[17] The first ground for review relates to the arbitrator's finding that Mokhele was guilty of misconduct in circumstances where the rule is clear that a declaration needs to be made only in respect of a gift in excess of R 350. The Department

¹ (2013) 34 ILJ 2795 (SCA).

failed to prove any gifts in excess of R 350 and it is Mokhele's case that she should not have been disciplined, as she has not committed any misconduct. The Applicant submitted that the arbitrator has not applied her mind correctly.

- [18] The Department submitted that clause (c)(5)(iii) of the Code of Conduct provides that “ *an employee does not use her or his official position to obtain private benefits for herself or himself during the performance of her or his official duties nor does she or he accept any gifts or benefits when offered as they may be construed as bribes.*”
- [19] In addition to the Code of Conduct there is an ‘Explanatory manual on the Code of Conduct for the Public service’, which is a ‘practical guide to ethical dilemmas in the workplace’. In this explanatory manual it is stated that ‘*an employee shall not, without prior written approval from the Head of the Department accept any gifts, benefits or item of monetary value (a description and the value and source of gift with a value in excess of R 350) from any person for himself or herself during the performance of duties as these may be construed as bribes.*’
- [20] The evidence of Mr Dlamini was that it was not about the value of the gift but employees in the public service are paid for their services and should not accept gifts for services rendered. He explained that employees should not accept gifts and gifts to the value of R 350 and more must be disclosed, but the practice was not to accept gifts at all. Mokhele testified that she accepted a bribe and she confessed that she accepted gifts for quicker services.
- [21] The arbitrator held that Mokhele had an opportunity at the arbitration to clarify that she had done nothing wrong, but she presented varying submissions. The arbitrator dealt with those submissions, including that at the arbitration Mokhele accepted that what she did was wrong and that it was to accept a bribe.
- [22] In respect of the issue of the value of the gift the arbitrator dealt with Mokhele's defence that only if the gift was to the value of R 350 or more was there a need to disclose and the gift she received had a value of R 20. The arbitrator held that this was inconsistent in view of the true facts namely that Mokhele pleaded guilty at her disciplinary hearing after her representative

advised her to do so, she admitted in the arbitration that she was wrong to take a gift and the provisions of clause c(5)(iii) of the Code of Conduct that prohibits an employee to accept any gifts or benefits.

- [23] In her final analysis the arbitrator considered the charge levelled against Mokhele. The charge of misconduct was that Mokhele contravened the Code of Conduct for the Public Service when she knowingly and unlawfully accepted compensation in the form of gifts from funeral parlours, marriage officers and agents for performing her duties in exchange for preferential service. The Code of Conduct in terms of which the Department charged and dismissed Mokhele does not confine the acceptance of gifts to a monetary value, nor did the charge levelled against her.
- [24] In my view there is no merit in the Applicant's submission that she has not committed any misconduct and that the arbitrator committed reviewable irregularities, as set out in the application for review, in respect of her findings in this regard.
- [25] The second ground for review is that the arbitrator failed to take into account the initial plea bargain and the consequences of the plea bargain in the context of the facts of the matter. The Applicant submitted that on no construction of the rule has Mokhele committed any misconduct.
- [26] This ground for review is related to the fourth ground for review, which is that the arbitrator misconstrued the evidence relating to the misconduct. It is the Applicant's case that the Department bore the onus to prove the breach of the rule but it elected to lead no evidence on the breach of the rule but relied on Mokhele's confession. The Department did not lead any evidence contrary to the version presented by Mokhele and no reasonable decision maker could have found on the evidence that was adduced that the onus had been discharged.
- [27] In my view the provisions of the Code of Conduct quite clear that no employee is to accept any gift or benefit and the Applicant makes too much of the R 350 amount. This amount is not stipulated in the Code of Conduct and by no stretch of the imagination can it mean that employees could take and accept gifts and benefits as long as the value is less than R 350.

- [28] Be that as it may, the Applicant's case is that the arbitrator failed to deal with the issue of the plea bargain in circumstances where this was raised as an issue in that Mokhele pleaded guilty on the basis of a plea bargain.
- [29] The arbitrator indeed dealt with the issue of the plea bargain and she found that it was evident that the chairperson of the disciplinary enquiry was not prepared to allow his independence to be interfered with and he made a decision on the facts before him and not on the basis of a plea bargain.
- [30] The arbitrator further considered that Mokhele testified that she made a confession on the premise that Maqula would indemnify or exonerate her of any punitive action and that the chairperson of the disciplinary enquiry failed to take that into account. The arbitrator held that Mokhele was afforded a further opportunity in the arbitration to clarify that she did nothing wrong, yet she conceded in her testimony that she was wrong to accept a gift.
- [31] The transcribed record shows that Mokhele admitted that she understands English, but she had great difficulty to explain why she wrote that she accepted '*presents from the agents, funeral parlours and marriage officers for quicker services*' when it was her version that she only accepted one packet of biscuits once.
- [32] Mokhele did not call Maqula as a witness to corroborate her evidence in respect of the plea bargain or any other aspect where she needed Maqula's evidence to support her version.
- [33] Mokhele has during the arbitration proceedings and independent from her confession or plea bargain, admitted that what she did was wrong and she accepted a bribe. How that Applicant can persist with her case that since the Department did not lead any evidence contrary to the version presented by Mokhele, no reasonable decision maker could have found on the evidence that was adduced that the onus had been discharged, is astonishing.
- [34] Mokhele never testified that the confession she wrote was not the truth or that she was forced to write it, on advice of the representative she pleaded guilty at her disciplinary enquiry and at the arbitration, she admitted to wrong doing. In my view it was reasonable to find that the onus had been discharged.

- [35] The Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*² affirmed the test to be applied in review proceedings and held that a piecemeal approach should not be followed. It held that:

‘In short: A reviewing 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.

..... In a review conducted under s 145(2)(a)(ii) of the LRA, the reviewing 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 process related irregularity sufficient to set aside the 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.

To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in s 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly.’

- [36] In my view the arbitrator dealt with the issue of the plea bargain and the confession drafted by Mokhele. The Applicant submitted that the arbitrator failed to deal with these aspects and she made no findings on that and her failure constitutes a reviewable irregularity.
- [37] A review Court should not take a piecemeal approach and the submissions in respect of these grounds for review is requiring of this Court to do just that.
- [38] The third ground for review relates to procedural aspects and it is the Applicant's case that the arbitrator failed to deal with these issues and in failing to deal with it, she committed a reviewable irregularity. The issues are that the matter was already dealt with when Mokhele was given a precautionary transfer and that she was not charged timeously and secondly the length of time taken by the chairperson of the disciplinary enquiry to

² (2014) 35 ILJ 943 (LAC).

communicate the final outcome, contrary to the rules set out in the disciplinary code.

- [39] It is evident from the transcribed record that after the Department closed its case Mr Govender, who was Mokhele's representative at the time, raised two points. The first point was that Mokhele was transferred from her section to another section and as a result thereof, the matter was disposed of in an informal manner and she was only charged many months after that. The other point raised was that chairperson's findings were only communicated months after the disciplinary enquiry. These issues were not raised specifically with the Department's witnesses prior to the closing of the Department's case.
- [40] The transcribed record shows that the arbitrator dealt with the issues during the arbitration process and she told Mr Govender that the issues he raised after the closing of the Department's case, should have been raised at the outset and should have been dealt with in evidence and put to the Department's witnesses.
- [41] The arbitrator dealt with the points raised during the arbitration.
- [42] Mr Govender subsequently withdraw the points that he has raised and the arbitrator recorded the following: *"For the record what I would, it's all on the record, what I'm going to do is I'm going to insert a note that there are two procedural points raised you asked me to deal with in an application. However you've withdrawn that."*
- [43] The submissions made by the Applicant in respect of this ground for review are disconnected from the transcribed record. It is evident from the transcribed record that the procedural issues, now raised in the review application, had been withdrawn. There was no need for the arbitrator to deal with issues and to make findings on the issues that were raised and withdrawn and that she has dealt with during the arbitration proceedings.
- [44] This ground for review is not supported by the evidence from the transcribed record and has no merit.
- [45] The last ground for review is that arbitrator misconducted herself, alternatively committed a gross irregularity, alternatively failed to conduct herself as a

reasonable decision maker by failing or neglecting to deal with the allegation of consistency in relation to Ms Kakuse.

- [46] It is apparent from the transcribed record that at the commencement of the arbitration it was disputed whether the rule was consistently applied. No names were however mentioned.
- [47] In the testimony of Mr Dlamini he was asked about the consistency of the application of the rule and he testified that one Nkosi Ngidi was dismissed with the Applicant for the same misconduct. In cross-examination and in dealing with the issue of consistency, Mr Govender put it to Mr Dlamini that Mokhele's testimony would be that she was not suspended. No other version in respect of consistency was put to the Department's witness, nor did Mokhele present another version in her own testimony.
- [48] In the heads of argument the Applicant submitted that the issue of consistency was raised at the outset of the hearing as an issue in dispute and that the issue was reiterated in the Applicant's closing argument wherein it was submitted that L Ngobeni and T Kakuse were employees of the Department and had been given written warnings for misconduct where they have been in breach of the rules which constituted serious misconduct.
- [49] It is trite that closing arguments are not done under oath and do not form part of evidence. Closing arguments are done when all the evidence has been presented, all the questions have been asked and all the exhibits have been introduced and it is based on the evidence that was presented. The facts and issues in the case determine the contents of closing arguments.
- [50] In closing arguments the facts as presented are weaved with the applicable legal principles to make out an argument to persuade the fact finder. It cannot introduce facts that were not presented and tested during evidence. Facts not introduced under oath during evidence have no value if introduced in closing arguments.
- [51] It is clear from the record that the version that one Ngobeni and Kakuse were given written warnings for serious misconduct was not raised with the Department's witnesses. It is raised in Mokhele's closing argument.

- [52] The Applicant also submitted that the arbitrator made no reference to the inconsistency challenge. This is factually incorrect as the arbitrator in her analysis of the matter the arbitrator stated that Mr Dlamini was challenged on the issue of consistency and that he referred to Ngidi, who was also dismissed.
- [53] The arbitrator cannot be faulted for not considering the allegations about inconsistency involving Ngobeni and Kakuse when that was not part of the evidence presented, but only raised in closing argument.
- [54] In reviewing the arbitration award I must consider the totality of the evidence adduced and decide whether the decision made by the arbitrator is one a reasonable decision maker could make. This Court is not to consider every factor individually or independently, but is to consider the evidence and the award in its totality and holistically.

Conclusion

- [55] Mokhele submitted that the arbitration award is not reasonable *inter alia* because the arbitrator committed a gross irregularity in the conduct of the proceedings, she made mistakes of law and misconceived the nature of the enquiry.
- [56] In reviewing the arbitration award, the grounds for review as raised by the Applicant must be assessed. This Court can only decide whether the arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. The test to be applied is a strict one.
- [57] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I cannot find that the arbitrator's decisions do not fall within the band of decisions to which a reasonable decision maker could come.
- [58] The arbitrator's decisions are reasonable and the award is not to be interfered with on review.
- [59] The Department argued that costs should be awarded in its favour and I can see no reason why the costs should not follow the result.

[60] In the premises I make the following order:

Order

[61] The application for review is dismissed with costs.

Connie Prinsloo

Acting Judge of the Labour Court

Appearances:

Applicant: Mr Macgregor – Macgregor Erasmus Attorneys

Third Respondent: Advocate I J Patel

Instructed by: State Attorney

LABOUR COURT