



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 339/12

In the matter between:

WALTER SISULU UNIVERSITY

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

SWANEPEL, ANSIE N.O

Second Respondent

SBONGILE MHLOLI

Third Respondent

Heard: 2 September 2015

Delivered: 19 February 2016

Summary: The errors made by the commissioner in the conduct of the arbitration had an impact on his award and rendered it unreasonable and therefore reviewable.

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 commissioner”) in which she found that the third respondent was dismissed by the applicant and that such dismissal was substantively and procedurally unfair. She ordered the applicant to reinstate the third respondent. This application is opposed by the third respondent. The review application was filed seven days late and the applicant applied for condonation. The condonation application is unopposed. The extent of the delay is minimal and its explanation reasonable. I could find no grounds for refusing it.

Factual background

- [2] The applicant employed the third respondent as a secretary/fire fighter on a fixed term contract on 15 March 2006. Her fixed term contracts were renewed a number of times. In 2008, the applicant and the respondent entered into a fixed term contract of employment for the period 1 March 2008 to 31 December 2008. In October 2008, the applicant informed the third respondent that her fixed term contract would not be renewed. In January 2009, the third respondent referred an unfair dismissal dispute to the first respondent (“the CCMA”) on the basis that the applicant had failed to renew her fixed term contract when she had reasonable expectation that it would be renewed. The dispute was arbitrated and the outcome of the arbitration (“the first arbitration”) was that the third respondent had failed to prove her dismissal and her claim was dismissed. She launched a review application to have the arbitration award reviewed and set aside. As the record of the arbitration proceedings could not be filed, an order was granted setting the arbitration

award aside and remitting the matter to the CCMA to be heard *de novo*. The dispute was arbitrated by the commissioner ("the second arbitration"). At the second arbitration, the third respondent based the unfairness of her dismissal on different grounds. She alleged that her dismissal was unfair because on 29 September 2008, the applicant informed her in a letter that she had been absorbed as its permanent employee with effect from 1 January 2009. She, however, was issued with another letter on 17 October 2008, in which she was informed of her dismissal on 31 December 2008. The applicant denied having issued the third respondent with the letter of 29 September 2008, and maintained that the contract of employment between the parties was terminated on 31 December 2008 when the fixed term contract expired. The commissioner found that the applicant had dismissed the third respondent and that the dismissal was substantively and procedurally unfair and ordered her reinstatement.

The award

- [3] In the reasons for her decision, the commissioner stated that she was impressed by the third respondent as a witness as she presented her evidence with candour and without hesitation. She did not contradict herself and withstood vigorous cross examination. She found the letter which the third respondent, on her version, was issued with on 29 September 2008 announcing her being absorbed as a permanent employee from 1 January 2009 to be a normal and natural consequence of the extended employment relationship that the third respondent at that stage already had with the applicant. She accepted the third respondent's testimony that the letter was taken back by the applicant because of some omission and that the third respondent and Mr Chopiso ('Chopiso'), her immediate manager, had confirmed her appointment in letters sent to HR. She was taken aback by the letter of 17 October 2008, informing her of her dismissal with effect from 31 December 2008. She found that the third respondent was a layperson who did not have the time or amenities to forge evidence to the extent referred to by the applicant. She was also not accused of any foul play during the arbitration

proceedings. The commissioner accepted the third respondent's version as the more probable.

- [4] Rejecting the applicant's version, the commissioner stated that she was not impressed by Chopiso as a witness as he was arrogant and argumentative. While he conceded that he had his signature scanned to facilitate the signing of his letters in his absence, he denied that he was the author of the letters the third respondent sought to rely on. He maintained that the third respondent performed secretarial duties only and that he notified the third respondent on 17 October 2008, of the non-renewal of her contract because he wanted to give her time to deal with her financial matters. She rejected Chopiso's evidence that the third respondent was not a fire fighter and that she wrote letters without his consent because his version was not put to the third respondent during her cross examination. She found Chopiso's denial that he was the author of the letters to be an attempt to sidestep responsibility. He acted outside the scope of his authority by issuing the dismissal letter of 17 October 2008. She rejected Chopiso's evidence that the font of the letter of 17 October 2008 was incorrect because he testified that his computer skills were minimal. She criticised the applicant for not calling the HR Director to refute the evidence that the letter appointing the third respondent on a permanent basis was issued by his Department. She rejected the evidence of the applicant's second witness, Mr Bitsoane and labelled him a hired gun who was coerced to echo Chopiso's evidence. The commissioner observed that as to procedural and substantive fairness, no evidence was presented that the applicant did anything to validate the termination of her contract.

Grounds for review

- [5] The applicant's first ground for review is that the third respondent obtained the award as a result of perjury and fraud, thus obtaining the award improperly as contemplated in section 145(2)(b) of the Labour Relations Act 66 of 1995 ('the LRA'). Substantiating the ground, the applicant submitted that the three letters that the third respondent relied on to prove her case were fabricated by her to create a case against the applicant. The applicant submitted that the third

respondent's case changed as at the first arbitration, she had based her case for unfair dismissal on the applicant's failure to renew her fixed term contract when she had reasonable expectation that it would be renewed. She made no mention of the letters which she relied on at the second arbitration which, on her vision, proved that she was dismissed unfairly when she was a permanent employee of the applicant.

- [6] The third respondent correctly pointed out that the first ground of review has no basis as the applicant denied knowledge of the letters that she sought to rely on to prove the unfairness of her dismissal at the second arbitration. The commissioner dealt with the issue and elected to prefer her version. If the applicant wished to allege that the letters were fraudulent, the applicant should have made the allegation at the arbitration. The applicant may not be permitted to use these proceedings to augment the case that it presented at the arbitration.
- [7] The applicant further alleged that the commissioner committed gross irregularities by placing on it, the onus of proving the third respondent's allegation that she was offered permanent employment by its Human Resources Director. She failed to take into account relevant evidence led by the applicant to the effect that making a permanent appointment involved a procedure in terms of which a candidate was required to be interviewed and submit proof of qualifications and certificates. The procedure was not followed when the applicant's alleged permanent appointment was made. The award was further attacked on the basis that the commissioner made irrational findings which were not based on evidence. They include the finding on Chopiso's computer skills and the third respondent's lack of time and amenities to forge evidence.

Analysis

- [8] The test for review is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.¹ The applicant relied

¹ In this regard see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110.

heavily on the ground that the commissioner made errors and committed gross irregularities. In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*,² it was held that not every error or omission renders an award reviewable and circumstances which warranted review were expressed thus:

‘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 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, 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.’

- [9] A number of grounds for review are based on the manner in which the commissioner dealt with the dispute of fact before her which resulted from the applicant and the third respondent presenting mutually exclusive versions of what led to the termination of their employment relationship. The leading authority in resolution of disputes of fact is *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cei and Others*.³ Relying on that decision, the court, in *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*⁴ held thus:

‘A court’s finding on the credibility of a witness ordinarily depends upon a variety of factors such as the witness’ candour and demeanour in the witness box, his bias, latent or blatant, internal contradictions in his evidence, external contradictions in what was pleaded or put on his behalf, or with established facts or with his own statements or actions outside the court; the probability or improbability of particular aspects of his version; and the calibre and cogency of his performance, compared to that of other witnesses testifying about the same incident or event. Courts on a number of occasions have warned about

² [2013] 11 BLLR 1074 (SCA) at para 25.

³ 2003 (1) SA 11 (SCA).

⁴ (2015) 36 ILJ 2038 (LAC) at para 14.

the risk inherent in relying on the demeanour of witnesses as a reliable guide to credibility.’

- [10] The totality of the material before the commissioner reflects that the commissioner committed gross irregularities which rendered the award unreasonable. Although she attempted to apply the correct test in resolving the dispute of fact, she omitted material parts of the test. She failed to consider internal contradictions in the third respondent’s case which includes her referral documents. While the referral documents do not constitute pleadings, there was a duty on the commissioner to deal with the contradictions in the third respondent’s version as it appears in the referral documents and the version that she presented at the arbitration. The duty was more onerous because the version in the referral documents is consistent with the applicant’s version. The commissioner’s finding that the third respondent was a layperson who did not have time and amenities to forge the letters proving her permanent appointment is inconsistent with the evidence. The third respondent was a typist and could therefore type any letter. The period between her alleged dismissal and the submission of the letters is over three years. It is a lot of time. The third respondent typed letters for Chopiso for years. Chopiso was therefore in a position to comment on the correctness of the font used by the third respondent in letters. The ruling that he was unable to, owing to minimal computer skills is not supported by evidence. The rulings are based on conjecture and had an impact on the commissioner’s decision.
- [11] The commissioner failed to consider all the relevant evidence when coming to her decision. She failed to consider the applicant’s evidence that amongst the facts which proved that the third respondent’s version, that she was employed on a permanent basis was false, was that the purported appointment was not made in terms of its appointment procedure. The evidence is material and failure to consider it influenced the commissioner’s decision. In *Minister of Safety and Security and Another v Madikane and Others*,⁵ it was held that failure to take into account all the relevant evidence is not only wrong but also

⁵ (2015) 36 ILJ 1224 (LAC) at para 46.

unreasonable. The gross irregularities committed by the commissioner rendered her award unreasonable.

[12] The applicant sought an order substituting the arbitration award. A correct decision on the fairness of the third respondent's alleged dismissal can only be reached after the dispute of fact about the existence of the dismissal has been properly dealt with. Such an investigation can only be conducted at arbitration.

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

13.1 The late filing of the review application is condoned.

13.2 The arbitration award issued by the second respondent under case number ECEL 351-09 and dated 28 May 2012 is reviewed and set aside.

13.3 The matter is remitted to the first respondent to be arbitrated *de novo* by a commissioner other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Kirchmann of Kirchmanns Inc

For the Third Respondent: Mr Zono of Zono & Associates

LABOUR COURT