



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

CASE NO: PR 235/14

In the matter between

THANDIWE CYNTHIA STOKWE

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL:

DEPARTMENT OF EDUCATION,

EASTERN CAPE

First Respondent

HEAD OF DEPARTMENT,

DEPARTMENT OF EDUCATION:

EASTERN CAPE PROVINCE

Second Respondent

EDUCATION LABOUR RELATIONS

COUNCIL

Third Respondent

THANDO QOTOYI

Fourth Respondent

Heard: 6 August 2015

Delivered: 19 February 2016

Summary: An applicant seeking to have an arbitration award reviewed and set aside on the grounds that it has a defect as envisaged in section 145 of the Labour Relations Act 66 of 1995, must prove the defect. Errors in the conduct of the arbitration which have no effect on the reasonableness of the award do not constitute defects.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an arbitration award of the fourth respondent ('the arbitrator') in which he found the applicant's dismissal substantively fair. It is opposed by the first and second respondents ('the respondents').

Factual background

- [2] The applicant was employed by the Department of Education, Eastern Cape ('the Department') as an educator until her dismissal on 22 June 2011, after 13 years' service. On dismissal, the applicant was a Deputy Chief Education Specialist for Learners with Special Needs in Education ('LSEN'). She was based at the Uitenhage District Office. In 2008, Mr Spies ('Spies'), the Chief Education Specialist who the applicant reported to was on sick leave and some of his duties were performed by the applicant. Amongst those duties was coordinating scholar transport. After Spies had resumed his duties in 2009, he discovered that the applicant had approved a contract of Dikela Tours and Distributors, an entity which her husband was a Director of, to transport scholars of Palmiet River Primary School. He reported the matter and the applicant was charged with four counts of misconduct and dismissed.

Aggrieved by her dismissal, the applicant referred an unfair dismissal dispute to the third respondent ('the bargaining council'). The dispute was arbitrated by the arbitrator who found that the applicant had made herself guilty of the fourth charge only which was misuse of her position in the Department of Education or a school or adult learning centre to promote or prejudice the interest of any person as she approved a service to be rendered by her husband thus promoting her own interest and that of her husband. The arbitrator found the sanction of dismissal appropriate and concluded that the applicant's dismissal was fair.

The award

- [3] In reaching the decision that the applicant had made herself guilty of the fourth charge, the arbitrator took into account the applicant's evidence that she was guided by the revised policy in carrying out her duties. Clause 11.2.1 of the policy required officials who had an interest in a service provider to disclose the said interest and to obtain permission from the Head of the Department. It is common cause that the applicant disclosed her interest. She, however, did not obtain the Head of the Department's permission to approve the contract between the respondent and her husband's business. The arbitrator took into account the memoranda which required strict compliance with the policy relating to scholar transport. The memoranda indicated that there would be serious consequences for those who transgressed the policy. He expressed the view that strict compliance with the policy was required because the use of public funds was involved. The name of the applicant's husband did not appear in the database for scholar transport service providers. The arbitrator rejected the applicant's explanation that she was faced with an emergency and did not have the luxury of time to get permission because the applicant used her husband's business for over a month without making an effort to obtain the Head of the Department's permission.
- [4] The applicant submitted that she had to help her husband because he was unemployed and had developed a low sense of self-esteem. He found that the applicant's conduct constituted misuse of her position as the scholar transport

coordinator to promote her husband's interest as well is her own thus abusing her position of trust. The arbitrator found the applicant's dismissal substantively fair as the gravity of the misconduct destroyed the trust that the respondents had in her.

Grounds for review

- [5] The applicant sought an order reviewing and setting aside the arbitration award on the grounds that the arbitrator's finding that she was guilty of charge four is based on his misunderstanding of the regulations. She denied having committed misconduct. She submitted that she appointed Dikela Tours in an emergency after the scholar transport that the school was using withdrew after giving only a day's notice. She made the appointment in compliance with the policy guidelines and reported the matter to her superior in writing. She denied that she was required to obtain the Head of the Department's permission as she was not the party seeking appointment as a service provider. She further criticised the arbitrator for overlooking the respondents' inordinate delay in finalising the disciplinary process. Her disciplinary hearing was held on 30 March 2011, she received her letter of dismissal on 22 June 2011 and on 16 August 2011, she requested, through her attorney, reasons for her dismissal. She lodged a provisional appeal on 17 August 2011 and her appeal was dismissed on 1 February 2014.
- [6] The applicant further submitted that the finding that she breached the trust that the respondents had in her is untenable as the respondents allowed her to continue working until the dismissal of her appeal, some two and a half years after she had been found guilty of misconduct and dismissed. The applicant expressed the view that because of the delay, the respondents abandoned the right to pursue disciplinary action against her. The outcome of her appeal was a fresh repudiation of the contract of employment. She submitted that the respondents should be estopped from dismissing her as schedule 2 of the Employment of Educators Act 76 OF 1998 ('the EEA') requires discipline to be applied in a prompt, fair, consistent and in a just manner. It should also be concluded in the shortest possible time.

- [7] The respondents opposed the application mainly on the grounds that the arbitration award is reasonable and based on the evidence tendered at the arbitration. The applicant conceded that she committed the misconduct because she wanted to support her unemployed husband who felt very sick and inferior from getting money hand-outs from her. In addition, she asked to be absolved from the act and be given a second chance. She admitted that she benefited indirectly from the contract which he awarded to her husband irregularly. The respondents insisted that the trust relationship between the parties has broken down completely. It consequently removed the scholar transport duties from the applicant after she was found guilty of misconduct pending the outcome of her appeal. They submitted that the applicant was not prejudiced by the delay in the finalisation of her appeal hearing. The respondents did not consider the delay excessive and submitted that there was no prescribed time limit for the finalisation of the disciplinary process which it completed within reasonable time. The reason proffered by the respondents for the delay is that it resulted from the national government's intervention in the affairs of the second respondent. The respondents denied that they should be estopped from relying on the letter declining the applicant's appeal and prayed for the dismissal of the review application with costs.
- [8] The applicant alleged that the answering affidavit was filed late but the allegation was successfully refuted by the respondents.
- [9] This court may review an arbitration award if it is unreasonable. The test for review is elucidated as follows *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*:¹

'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, are

¹ [2013] 11 BLLR 1074 (SCA) at para 25.

not in and of themselves sufficient for an award to be set aside, but are only of any consequence if the effect is to render the outcome unreasonable.'

- [10] An assessment of the totality of the evidence which served before the arbitrator as well as a proper reading of the arbitration award reflects that the arbitrator fulfilled his duties in terms of section 138 of the Labour Relations Act 66 of 1995. He did not misconceive the nature of the enquiry. He recorded, correctly, that he had to determine the substantive and procedural fairness of the applicant's dismissal. He considered the evidence before him properly and reached a finding that the applicant was not guilty of three of the charges which had been preferred against her. The arbitrator correctly concluded that the applicant misused her position to promote her husband's interests. The applicant conceded that she breached the policy by awarding a scholar transport contract to her unemployed husband because he was ill and she wanted to boost his self-esteem and enable him to earn his own income instead of taking hand-outs from her.
- [11] The applicant's submission that the arbitrator misunderstood the regulations is not supported by the evidence tendered at the arbitration. In the applicant's memorandum dated 23 March 2009 which she addressed to the District Director, Education Support Services and Labour Relations, she recorded that in a special meeting for principals and educators in the scholar transport scheme, she made it clear that according to the policy, they may not benefit in any manner directly/indirectly from the subsidy system unless there is no alternative transport available or on one is prepared to render the service. The policy that she was referring to is clause 12.3.7 of the (Revised) Policy Guidelines for Scholar Transport which reads thus:

'No principal or educator is benefiting in any manner i.e. directly or indirectly, from the subsidy scheme unless there is no alternative transport available or no one is prepared to render the service. This declaration (unavailability of transport and transport provider) should always be in writing, authenticated by both the Principal, SGB and the school's Circuit Manager and recorded for future reference.'

- [12] In May 2009, when the applicant used her husband's business for scholar transport, she was aware that she was acting in breach of the scholar transport policy. On 8 May 2009, the Acting Director SSS and SSM, NN Tyani, issued a memorandum in which he stated that certain officials employed by the Department were acting in breach of clause 11.2 .1 and clause 12.3.7 of the scholar transport policy. He warned that any deviation from the policy would lead to serious consequences. In a memorandum addressed by the Acting Superintendent General to Cluster Chief Directors, and all District Directors CES-ESSS dated 27 May 2009, he echoed the same sentiments expressed in NN Tyani's memorandum and reminded clusters to ensure that stringent disciplinary measures were taken against transgressors failing which non-compliance would result in disciplinary measures against accountable district officials. When the applicant continued using her husband's business for scholar transport from May to August 2009, she was aware of the gravity of her misconduct as well as its consequences.
- [13] The arbitrator correctly concluded that the applicant misused her position to promote her husband's interest. The applicant sought to be absolved from her act of misconduct and asked for a second chance. Her defence that she used her husband's business because she had a crisis as the contractor that she was using withdrew after giving a day's notice was correctly rejected by the arbitrator as false. The applicant continued using her husband's business for months after the crisis was over. She did not attempt to comply with the policy and only refrained from her misconduct after it was discovered by Spies. The arbitrator applied his mind to the appropriateness of the sanction. The fact that an employment relationship has broken down may be apparent from the nature of the offence that the employee has committed.² [13] The respondents correctly argued that the applicant's argument on estoppel was ill-conceived is correct. No basis was laid for the defence and estoppel may not be relied upon to make what is unlawful, lawful. The arbitrator considered the evidence and provisions of schedule 2 of the EEA. His finding that the delay cannot be construed to mean that the respondents had abandoned the disciplinary proceedings against the applicant cannot be faulted.

² In this regard see *Department of Home Affairs v Ndlovu* [2014] 9 BLLR 851 (LAC) at para 16.

[14] The arbitrator erred in finding that the scholar transport policy required the applicant to obtain the Head of the Department's authority before using her husband's business for scholar transport. The error did not render the award unreasonable because the arbitrator's decision that the applicant's dismissal was substantively fair because she committed grave misconduct which warranted dismissal by benefitting from her husband's scholar transport contract is reasonable. The arbitration award falls within bounds of reasonableness and there are, therefore, no grounds to have it reviewed and set aside

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

15.1 The application is dismissed.

Lallie J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Grobler

Instructed by Michael Randell Attorneys

For the Third Respondent: Advocate Rawjee

Instructed by State Attorney

LABOUR COURT