



IN THE LABOUR COURT OF SOUTH AFRICA,

JOHANNESBURG

Not Reportable

Case No: JR628/13

In the matter between:

ASHLEY GAVIN FRANK

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER PRAKASH RHOOPA N.O.

Second Respondent

NORTH WEST UNIVERSITY

Third Respondent

Heard: 19 November 2015

Delivered: 17 January 2017

Summary: Review application,application dismissed.

JUDGMENT

BALOYI, AJ

Introduction

1. The applicant seeks the review and setting aside of an arbitration award of the second respondent, (the “commissioner”), dated 11 March 2013, case numbers NWKD3522-12 and NWKD3761-12 issued under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA). The application is brought in terms of section 158(1)(g) and/or section 145 of the Labour Relations Act (LRA)¹. The applicant seeks as primary relief substitution of the award, and in the alternative, remittal of the matter to the CCMA for a hearing anew.
2. The applicant referred to the CCMA: (i) a dispute of unfair labour practice in terms of section 186(2)(a) of the LRA, in which he sought a ruling that the conduct of the third respondent, North West University relating to his probation is unfair (NWKD3522-12; and (ii) a dispute of unfair dismissal in terms of section 186 and 191 in which the applicant sought a ruling that the termination of his employment constitutes a dismissal and that the dismissal is procedurally and substantively unfair, alternatively, procedurally unfair (NWKD3761-12). Conciliation of both disputes was unsuccessful and the matters were referred to arbitration, and by agreement consolidated and heard together. In the award sought to be reviewed and set aside, the commissioner found that the applicant has not shown that: (i) the third respondent committed an unfair labour practice; and (ii) he had been unfairly

¹ Act 66 of 1995.

dismissed. The commissioner accordingly dismissed the claims of the applicant.

The issues for determination by the commissioner

3. By agreement between the parties, the matter before the commissioner proceeded by way of a stated case and documents submitted by each party as evidence. The parties also made legal submissions. The questions that the commissioner was required to determine are recorded in the stated case as follows—

3.1. That should it be ruled that the applicant automatically became a permanent employee on 1 August 2012, or an earlier date, that the respondent's conduct constitutes an unfair labour practice and the termination of the applicant's services will be regarded as an unfair dismissal, both procedurally and substantively.

3.2. With respect to the issues to be decided by the commissioner, the parties agreed that should it be found that the applicant's probation was extended beyond 31 July 2012, or that the applicant did not obtain permanent status (presumably after 31 July 2012), the parties only require that the commissioner determine the following issues—

3.2.1. Whether the applicant's probation was extended beyond 31 July 2012, and if so, whether the applicant's employment became permanent on 1 August 2012, or any earlier date.

3.2.2. Should it be ruled that the applicant's probation was extended beyond July 2012, the following—

- (i) Whether the University was obliged to inform the applicant of the extension of his probation beyond July 2012;
- (ii) Whether the University was entitled to unilaterally extend the applicant's probation without affording him an opportunity to be heard;
- (iii) Whether the extension was justified and fair; and

(iv) The term of the extended probation.

3.3. Should it be ruled that the applicant's probation was indeed extended beyond July 2012, or that the applicant did not obtain permanent status on 1 August 2012 or any earlier date, the following—

3.3.1. Whether the termination of the applicant's services was procedurally fair;

3.3.2. Whether the CCMA has the jurisdiction to determine the legality of the termination of the applicant's employment, and if so, whether the termination thereof was lawful, "and if so, therefore in totality unfair" (would appear that this is an error and was in fact intended to read "fair" instead).

3.3.3. Whether the CCMA has the jurisdiction to consider or take into account the circumstances and legal position relating to the extension of the applicant's probation in February 2012.

The Relevant Facts

4. From the record, the following facts are common cause—

4.1. The applicant was employed by the North West University (the "University") from 1 February 2011 in the Faculty of Commerce and Administration as Professor (Peromnes Grade A5) in the Graduate School of Business and Government Leadership at the University's Mafikeng Campus. The terms of the appointment included— (i) the appointment was subject to probation from 1 February 2011 to January 2012; (ii) the probation could be extended at the discretion of the University; (iii) the applicant's employment may be terminated by either party on 3 months' notice; (iv) the appointment was subject to conditions of employment applicable to academic personnel². Clause 1.2.3 of the conditions of service reads:

² Clause 1.1 of Conditions of Employment For Academic Staff (Permanent).

“Subject to the provisions that MANAGEMENT may approve your permanent appointment is subject to probationary period of one year or as otherwise specified in your letter of employment. After completion of the probationary period, MANAGEMENT may confirm your appointment or extend the probationary period according to conditions set by MANAGEMENT or terminate the appointment with three calendar months written notice following the procedures as set out in the Labour Acts”.

- 4.2. On 30 January 2012, the University extended the applicant's probation to 31 July 2012 and he was informed of this on 8 February 2013. It is common cause that the applicant did not refer a dispute of unfair labour practice pertaining to this extension of probation.
- 4.3. On 31 July 2012, the applicant met with a Professor Pelser of the University and they discussed issues relating to applicant's performance. According to the university, the meeting discussed: (i) the manner in which the applicant's performance was to be assessed; (ii) certain concerns were raised; (iii) and that the applicant's response was needed to verify his research outputs. In any event, it is common cause that on 31 July 2012 the applicant was not informed that he was appointed on a permanent basis. Neither was he informed that his probation was extended for a further period or that he remained on probation.
- 4.4. In a letter to the applicant dated 28 September 2012, with the heading “Work Performance/Outcome of Extended Probationary Period”, the University set out a litany of issues about the applicant's conduct and performance in the period of probation. The letter concludes by— (i) informing the applicant that he failed and/or neglected to perform up to the required standard and conducted himself in a manner incompatible with the values of the University; and (ii) inviting the applicant to provide written reasons why he should be recommended for permanent appointment, after which he would be informed of the decision whether or not he is considered for permanent appointment. The applicant's

written response to the letter was received by the University on 24 October 2012.

- 4.5. In a letter dated 31 October 2012, the university applicant was informed that the University had decided not to appoint him on a permanent basis. The letter also informed the applicant that his employment would terminate on 30 November 2012 and his employment was terminated accordingly.
- 4.6. In the aftermath of his dismissal, the applicant referred a dispute of unfair dismissal to the CCMA in which he alleges that the decision to terminate his employment was taken without him being afforded a hearing whatsoever. It is not apparent from the record or the affidavits filed before this Court when in the sequence of events the dispute of unfair labour practice was referred to the CCMA.
- 4.7. In the arbitration, the applicant contended that he became a permanent employee on 1 August 2012 by virtue of the fact that his probation was not extended or his services terminated on the expiry of probation on 31 July 2012. The applicant contended that the confirmation of his appointment was not required to be express or in writing and could be tacit or by implication.

Is the award liable to be set aside?

5. The grounds for review relied upon by the applicant are set out in paragraphs 38 to 45 of the applicant's affidavit. In an effort not to do any injustice to the grounds relied upon, I list the grounds for review as they appear in the affidavit. The applicant contends that the commissioner committed misconduct in relation to his duties as commissioner, alternatively committed a gross irregularity in that—
 - 5.1. He did not properly, rationally and justifiably apply his mind to the facts and failed properly to consider the matter and argument;

- 5.2. Failed to properly apply the provisions of the Constitution of South Africa;
 - 5.3. The finding is not justifiable in relation to the reasons given for it, and such finding is not rational or justifiable in its merits or outcome;
 - 5.4. He failed to properly apply his mind and to have proper consideration of the facts and the law in respect of his discretion; and
 - 5.5. Failed to properly, justifiably and reasonably determine and assess the submissions before him.
6. The applicant further contends that - the commissioner committed a reviewable misconduct and he conducted himself in a grossly irregular manner in that he failed to appreciate the nature of the dispute before him; he misconstrued the extent/scope of his powers in so far as his entitlement to consider whether the termination of the applicant's employment was unfair, as it equated to a breach of contract, which constitutes misconduct; the commissioner was biased in that he expressed a view, in an informal ("off the record") discussion that the compensation proposed by the applicant was an "exceptional award being sought".
7. Section 145, in relevant part, provides that—
- “(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award”.
- Subsection (2) describes a defect as meaning—
- “(a) that the commissioner—
- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained”.

8. Section 158(1)(g) provides that the Labour Court may—

“subject to section 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds permissible in law”.

I am satisfied that the grounds for review relied upon by the applicant fall squarely within section 145. I therefore do not propose to say any more about the reliance on section 158(1)(g).

9. With respect to a review of an arbitration award in terms of section 145, the Court in *Lekota v First National Bank SA Ltd*³, cautioned that when reviewing an arbitration award, it is not the function of the court to decide whether the commissioner acted correctly, but whether he committed misconduct or a gross irregularity or exceeded his powers within the meaning of section 145. The test for review of arbitration awards rendered in terms of the LRA has been, and continues to be, extensively articulated in various analysis and pronouncements by our courts and in commentary. I do not propose to attempt any addition to the various considered and erudite body of views as I am satisfied that the question of the reviewability of the award in the present matter can be answered with reference to and the application of the guidance of the Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA*⁴. On the application of the test for review on the grounds of misconduct, gross irregularity and/or excess of power, the Court said that the proper questions to ask in relation to the conduct of arbitration proceedings or “process-related” issues, are the following:

9.1. 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?

³ [1998] 10 BLLR 1021 (LC) at para 16.

⁴ [2014] 1 BLLR 20 LAC.

- 9.2. 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).
- 9.3. Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?
- 9.4. Did he or she deal with the substantial merits of the dispute?
- 9.5. Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?⁵
10. I accordingly take guidance from the above in considering whether the award is reviewable on the grounds contended by the applicant.

Did the applicant become a permanent employee after 31 July 2012?

11. On the question whether the applicant's probation was extended beyond 31 July 2012, the commissioner found in the negative. The commissioner found that in the period after 31 July 2012, the University conducted an assessment of the applicant's performance and his suitability for retention. A performance discussion with the applicant was conducted and the applicant was invited to respond in writing to issues raised with him relating to his performance. The applicant understood that this was a process to evaluate his performance for a decision about his continued employment and he participated in the evaluation process without complaint that an evaluation of his appointability in that period was unnecessary in the light of his alleged permanent appointment as he alleges or otherwise unfair. I find no fault with this finding of the commissioner on the grounds contended for by the applicant and the commissioner's decision must stand.
12. Whilst an express statement to the applicant immediately after 31 July 2012, that his permanent appointment was subject to the completion of the evaluation of his performance for the period ending 31 July 2012 would undoubtedly have avoided any uncertainty, reasonable or otherwise, it does

⁵ Id at para 20. See also *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

not follow in this case that in the absence of such express statement the applicant assumed permanency on 1 August 2012 on the basis he contends. This is especially so on the present facts where the applicant was aware and in fact participated in the evaluation process to determine his retention or otherwise. The intention of the University was clear and the applicant does not contend that he was placed under the impression that the University had decided to retain him. The University would have to have created an impression, whether by conduct or silence, to the applicant that it had decided to retain him, for the applicant's contention that he was appointed tacitly or by implication to have any merit or otherwise hold. The commissioner found that the applicant had not shown that by conducting the evaluation in the period after 31 July 2012 before making the decision that the applicant would not be appointed, the University acted unfairly. I do not find this conclusion unreasonable or that it otherwise stands to be set aside on any of the grounds contended for by the applicant. On the facts that were before the commissioner, his conclusion that the applicant did not obtain permanency after 31 July 2012 meets the requirement of reasonableness. There is also no evidence of the bias alleged by the applicant – such discussion as the applicant relies on for the allegation of bias (an off the record comment before commencement of arbitration) is not in itself evidence of bias and more importantly no bias is manifest from the award. I find that the decision of the commissioner must stand.

13. For completeness, it is necessary to mention that the issue of the extension of the applicant's probation from 31 January 2012 to 31 July 2012 is not a matter that was properly before the commissioner, such not having been referred for conciliation. Accordingly, the commissioner could not have properly taken this issue into account in his determination, which exercise would have required that he makes conclusions about that extension of probation, as if the issue had been referred for determination by the CCMA.

Was the dismissal of the applicant unfair for want of a hearing?

14. This question arose in the event that the commissioner found that the applicant became a permanent employee with effect from 1 August 2012.

Having found that the applicant did not become a permanent employee, it followed that the answer to this question would be in the negative. I am unable to find that this decision of the commissioner was unreasonable. In any event, the applicant's contention that the termination of his employment is procedurally unfair because it was not preceded by a hearing is without merit. The applicant was presented with the issues to which the University required his response before it made the decision about his continued employment. The applicant responded to the issues and the University made its decision after receiving these concerns. Schedule 8(1)(h) prescribes exactly this⁶. A hearing in the circumstances does not entail a disciplinary hearing as one will expect in a case of misconduct, which the applicant contends his was the case, which contention has no merit in law or fact.

15. On the question whether the University's failure to give the applicant 3 months' notice of the termination of his employment as stipulated in his contract of employment is unfair, the commissioner found that the University's non-compliance with the notice period is a matter which is contractual in nature and that the CCMA does not have the jurisdiction to determine the issue whose jurisdiction is to deal with dismissals on the grounds of misconduct, incapacity and operational requirements. On the facts, the applicant was not terminated for misconduct and there is no merit in his contention otherwise. The applicant was terminated in accordance with the terms of his contract of employment, namely, that if he did not meet the requirements for appointment following probation, the University had the discretion not to appoint him. I am accordingly unable to find fault with the award of the arbitrator on the grounds contended for and do not agree that this conclusion is unreasonable. It follows that this decision of the commissioner must also stand.

Conclusion

16. With respect to costs, the parties each argued that costs follow the cause. I find no reason to order otherwise. The University has been successful and should be awarded its costs.

⁶ Code of Good Practice: Dismissal.

17. From the above, it follows that the application stands to be dismissed with costs. I find accordingly and make the following order.

17.1. The application is dismissed.

17.2. The applicant is to pay the costs.

Baloyi, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: J Keet

Instructed by: Scholtz Attorneys

For the Respondent: Henk Wissing

Instructed by: Henk Wissing Attorneys

LABOUR COURT