



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no.: JR 965/15

In the matter between:

MASAMUEL PATIENCE SEHLOHO

Applicant

And

COEN HAVENGA N.O

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

DEPARTMENT OF EDUCATION: FREE STATE

Third Respondent

Heard: 15 February 2017

Judgment: 15 February 2017

Edited: 13 March 2017

EX-TEMPORE JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the first respondent, to whom I shall refer as “the arbitrator”. In his award, which was issued on 7 April 2015, the arbitrator came to the conclusion that the applicant was guilty of the misconduct recorded in two charges brought against her during internal disciplinary proceedings and that her dismissal was for a fair reason. On that basis, the arbitrator refused the applicant the relief that she sought.
- [2] The charges against the applicant are twofold. The first charge relates to contravention of section 17(1) of the Employment of Educators Act, in that on 14 October 2013 the applicant was alleged to have committed an act of corruption in regard to the 2013 third term learner’s promotional reports, when she made the learner, Phoofolo pass although she had failed the term; the alternative to that charge is one brought in terms of section 18(1) of the Employment of Educators Act, in that on the same date, 14 October 2013, the applicant was alleged to have committed an act of dishonesty when she made Phoofolo pass although she had in fact failed the third term.
- [3] A second charge was brought against the applicant in the form of alleged contravention of section 18(1) of the Employment of Educators Act, in that on 14 October the applicant was alleged to have unjustifiably prejudiced the administration, discipline and efficiency of the school when she handed out promotional reports of the 2013 third term to learners without the authority of the principal or delegated authority.
- [4] At the disciplinary hearing the applicant pleaded guilty to the second charge. What served before the arbitrator then was a dispute concerning the findings of misconduct in relation to charge 1 and the alternative to that charge, to which I shall refer as “corruption and/or dishonesty” for the purposes of this judgment, and whether or not the penalty of dismissal which was upheld by the arbitrator was fair.

- [5] The parties agreed that no evidence would be led before the arbitrator, they agreed to have the matter arbitrated on the basis of written arguments alone. The arbitrator records that arguments were submitted and he records that he has studied and considered all of the arguments, the legal principles, the case law and the legislation referred to by the parties. He notes too that the parties had been requested to submit the record of the disciplinary hearing and other supporting documents as part of their written arguments, but this had not been done. He records that he made his findings on the basis of the summary of the disciplinary hearing provided by both parties in their respective written submissions.
- [6] Let me first pause to record that this is a most unsatisfactory way in which arbitration proceedings conducted under the Labour Relations Act ought to be run. The arbitrator in my view ought to have insisted at least on a submission of the full record of the disciplinary hearing if the arbitration were to proceed on the basis on which the parties had agreed. Alternatively, it was open to the arbitrator simply to override the parties' agreement and insist that evidence be led. Be that is as may, there is no dispute in this court as to the nature of the process adopted. The only substantive issue that served before this court this morning was whether the arbitrator's findings in regard to the charges of corruption and dishonesty could be sustained, having regard to the evidence that served serve before him.
- [7] The legal principles to be applied are well-established. This court has the power to intervene in and set aside arbitration awards if, and only if the award represents a decision that is so unreasonable that no reasonable decision-maker could come to on the available evidence. In other words, the test is outcome-based. The court must consider the outcome of the proceedings under review (ordinarily the decision to which the arbitrator comes) and the material that served before him. It is the function of a review court to establish the existence or

otherwise of a relationship of reasonableness between the two.

[8] The two-stage test that has been approved by the Labour Appeal Court requires an applicant to establish some form of misconduct or misdirection on the part of the arbitrator. However, given the nature of the test that is not sufficient. It is required that the applicant demonstrate that, notwithstanding the misconduct or misdirection relied upon, the outcome of the proceedings, as I have indicated, is one that falls outside of a band of decisions to which reasonable decision-makers could come on the available material.

[9] In the present instance, as I have indicated, the finding by the arbitrator in relation to charge 2 is not contested. In relation to charge 1 the arbitrator's reasoning is disclosed by the following paragraph, which is to be found in paragraph 4 of his award under the heading "Analysis of Evidence and Argument", it is at page 42 of the record. The arbitrator says as follows:

"I am satisfied that based on the arguments of the parties and on a balance of probabilities that the actions of the applicant indeed constituted the misconduct she was found guilty of. I cannot accept the version of the applicant that promoting a learner even from one term to another, irrespective of whether it was a progress or promotional report, while the learner clearly and obviously did not qualify for such promotion is a mere human mistake. The evidence shows that there was an improper relationship between her and the learner that would justify the inference to be drawn that it was done deliberately and that the learner benefitted unduly from that action."

[10] The evidence that served before the arbitrator disclose no more than that the relationship between the applicant and the learner concerned, Phoofolo, was that they attended church together and that Phoofolo visited the applicant in the storeroom at the school. It would appear that there was some evidence to suggest that some of the other teachers at the school may have had some

misgivings about the nature of this relationship, however, the Deputy Principal of the school stated that there was no improper relationship that he was aware of, and in his view the applicant was a competent employee notwithstanding the fact of her issuing the reports without the required authority as referred to in charge 2. Under re-examination, in particular, he stated that he did not know of any strange relationship between the employee and Phoofolo.

- [11] As I have indicated, the evidence by one Lerato Rantsane was that the applicant and Phoofolo knew each other and went to church together, that Phoofolo would talk to the applicant and visit her in the storeroom. She did not know what they talked about. There was no other evidence to which counsel for the third respondent could refer me which indicated that there was any relationship of corruption or that there was any dishonest conduct on the part of the applicant.
- [12] For the Commissioner to draw an inference of an improper relationship and thus make a finding of the existence of misconduct either in the form of corruption or dishonesty required evidence from which he could properly draw that inference. Inferences are not there to be drawn in the absence of evidence which serves to sustain the inference. In my view, there was insufficient evidence that served before the Commissioner to sustain an inference that there was an improper relationship between the applicant and the learner concerned, and the decision by the arbitrator to the contrary is a decision to which no reasonable decision-maker could come to on the available evidence. It follows that the third respondent had failed to prove in the arbitration proceedings that there was any improper relationship between the applicant and the learner concerned, let alone any corruption or dishonesty on the applicant's part.
- [13] That leaves charge 2. It was not disputed on behalf of the applicant that she was indeed guilty of the conduct or complaint that forms the subject of charge 2. The applicant's representative did dispute however the appropriateness of dismissal as a sanction having regard to that misconduct. It would seem to me that where

the misconduct that properly formed the subject of disciplinary action against the applicant is limited to issuing of reports without the necessary authority, that this is not a conduct that ordinarily attracts the severe penalty of dismissal.

[14] The applicant does not dispute that she did wrong and some other less severe penalty is appropriate. The applicant seeks to be reinstated into the third respondent's employ and concedes that reinstatement might be accompanied by an appropriate sanction short of dismissal. Having regard to the nature of the misconduct, in my view the sanction of a written warning is appropriate.

[15] In regard to costs, this court traditionally takes the view that where collective bargaining parties are involved in a dispute that an order for costs is ordinarily not appropriate. This is not one of those cases, the applicant is not represented by a union. Although the arbitration award reflects the union sat as the applicant in the proceedings, I accept that for the purposes of these proceedings she has proceeded without the assistance of the union and that the collective bargaining relationship to which the court ordinarily has regard to is not a factor. Given those circumstances, in my view and in terms of the broad discretion that this court has in terms of section 162 of the Labour Relations Act to make costs orders according to the requirements of the law and fairness, costs ought to follow the result.

The order I make then is the following:

1. The arbitration award issued by the first respondent on 7 April 2015 under case PSES461-14/15FS is reviewed and set aside.
2. The arbitration award is substituted by the following:
 - “(a) The applicant is guilty of charge 2 of the charges of misconduct brought against her.
 - (b) The penalty of unfair dismissal is unduly harsh and the applicant is reinstated into the employ of the respondent

subject to a written warning valid for a period of 12 months.”

3. The third respondent is to pay the costs of these proceedings.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT