



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1722/13

In the matter between:

ANEL OOSTHUIZEN

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

**BONGANI KHUMALO N.O. (cited in his
Capacity as Commissioner for the CCMA)**

Second Respondent

ABSA BANK LIMITED

Third Respondent

Heard: 03 May 2017

Delivered: 18 May 2016

JUDGMENT

SALOOJEE, AJ

Introduction

1. This is an application to review and set aside the second respondent's ("Commissioner's") arbitration award, which found that the applicant's dismissal was fair. The applicant also seeks to substitute the award with a finding that the applicant's dismissal was unfair.
2. At the commencement of the hearing, the applicant's representative confined the grounds of review to the substantive unfairness of the dismissal.

Background

3. During November 2007, the third respondent employed the applicant as a senior internal auditor.
4. During February 2011, the applicant informed the third respondent that she was not coping at work. The applicant suffers from depression coupled with attention deficit disorder, the applicant took extended sick leave from 20 May 2011 to 4 September 2011. However, the applicant did not return to work on 5 September 2011 and extended the sick leave by two weeks.
5. Upon her return, the applicant requested support from the third respondent by invoking the terms of the Wellness Policy. The applicant indicated that she was not coping at work and intended to discuss the impact of being away from work for more than three months.

6. The applicant's supervisor, its in-house doctor and other employees held six meeting with the applicant over the next few months. After one of the initial meetings and on the applicant's request, the third respondent decreased the applicant's workload.
7. On 6 October 2011, the third respondent's in-house doctor requested the applicant's psychiatrist to supply a medical report on the applicant's condition, medication, prognosis and further management.
8. The applicant's psychiatrist supplied a brief report on 24 October 2011 stating that the applicant was diagnosed and receiving treatment. Further, that the applicant's condition had improved and the prognosis was good.
9. During one of the later meetings between the applicant and the third respondent's representatives, the applicant made a request to work from home and reintegrated into the workplace at a later stage. In response, the third respondent recommended that the applicant be placed on temporary disability leave for a period of six months.
10. On 19 December 2011, the applicant rejected the third respondent's offer to be placed on temporary disability leave.
11. Despite returning to work, the applicant continued to suffer from the ill effects of her conditions. This resulted in the applicant leaving early from work or not attending work. The applicant did not submit leave forms nor

did she capture the leave taken on the third respondent's software system until early January 2012.

12. During this period the applicant's supervisor, Rudy Lingenfelder (*"Lingenfelder"*) observed that the applicant excessively used the Internet facilities for purposes other than the third respondent's business.
13. Lingenfelder conducted an investigation into the applicant's Internet usage and absence from work and on 30 January 2012 the applicant was suspended from work.
14. On 15 February 2012, the applicant was formally charged with four acts of misconduct relating to:
 - 14.1 Acting irregularly and/or dishonestly in respect of attending work and abuse of position of trust.
 - 14.2 Failing to adhere to Barclays policies and procedures.
 - 14.3 Abuse of Barclays IT resources and/or a breach of the email security policy and information security policy; and
 - 14.4 Absenteeism without permission for failing to submit leave forms and/or capture leave taken on the Barclays software system for twenty-seven days between September 2011 to January 2012.

15. The applicant was found guilty on all of the charges and dismissed on 15 March 2012. The applicant then referred an unfair dismissal dispute to the CCMA.
16. The Commissioner found that the applicant's dismissal was procedurally and substantively fair. The Commissioner also made a credibility finding against the applicant whom he found to be an unimpressive witness. The applicant was found to have made material concessions during cross-examination and changed her version in order suit the occasion. The applicant then filed this application.

Analysis

17. At the hearing, the applicant's representative confined the grounds of review to substantive fairness, in that, the Commissioner did not properly consider all of the facts of the case, did not attach appropriate weight to all of the factors of the case, acted unreasonably, failed to conduct a proper hearing in terms of the LRA, exceeded his powers in terms of the LRA and acted *ultra vires*, did not apply his mind to all of the facts and failed to assess all of the evidence before him.
18. The standard on review is set out in Sidumo and another v Rustenburg Platinum Mines Ltd and others [2007] 12 BLLR 1097 (CC) at par. 110:

"Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"

19. In Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & others [2014] 1 BLLR 20 (LAC) at par. 15-16, the Labour Appeal Court stated the requirements for a successful review:

“What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard a failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review.

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.”

20. In Head of the Department of Education v Mofokeng and others [2015] 1 BLLR 50 (LAC) at par. 30-31, the Labour Appeal Court held that:

“[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (“the SCA”) in Herholdt v Nedbank Ltd and this court in Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others have held that before such an irregularity will result in the setting aside of the award, it must in addition

reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues."

21. The judgment in *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality and Others* (CA 08/08) [2012] ZALAC 1; [2012] 7 BLLR 660 (LAC); (2012) 33 ILJ 1081 (LAC) (13 February

2012) at par. 27-29 dealt with an incapacity case rising from illness. The court set aside the award on this basis:

[27] In my view, the question posed and the aforementioned remarks made by the court a quo were misplaced as they did not take the following facts into account: firstly, none of the medical reports that were submitted claimed that the employee was permanently disabled or incapacitated. Secondly, there was a substantial lapse of time (a period of six months) between the application for medical boarding and the incapacity enquiry, such that by the time the arbitration hearing was held, the employee had, according to Dr. Kalinski recovered from his mental condition and could resume duties. Under such circumstances, there was no basis for finding that the employee was permanently incapacitated or that he could not reasonably be accommodated by the employer.

[28] In addition to the above, it is patently clear from the award that the commissioner did not pay due regard to items 10 and 11 of Schedule 8 and thus failed to comply with section 188(2) of the LRA, which non-compliance has already been alluded to in the preceding paragraphs. This is another reason why the award fell to be set aside, which the court a quo did not do.

[29] I am satisfied that the decision of the commissioner was not one that a reasonable decision-maker could have reached under the circumstances and ought to have been set aside by the court a quo and substituted with an order that the dismissal of the employee was both substantively and procedurally unfair. The

court a quo therefore erred in coming to the opposite conclusion. In view of this finding, which is dispositive of the matter, I do not deem it necessary to address myself to the aspect pertaining to the errors made by the court a quo in its summation of the evidence adduced at the arbitration hearing, which allegedly led it to make fundamental errors of fact."

22. The principal issue before the Commissioner was whether the applicant was unfairly dismissed. The Commissioner correctly identified and considered the principle issue, whether the applicant was unfairly dismissed. The Commissioner did not confuse the applicant's principal defence, that the third respondent should have reasonably accommodated her medical conditions, as an incapacity hearing.
23. On the second requirement, whether the Commissioner evaluated the facts presented at the hearing, the applicant's complaints require attention.
24. The applicant's complaints are that the Commissioner incorrectly understanding or capturing the applicant's evidence. On a reading of the transcript, the applicant's complaints, set out in paragraph 92 of the supplementary founding affidavit, are nugatory.
25. In Smith v Commission for Conciliation, Mediation & Arbitration & others (2004) 25 ILJ 1072 (LC) at par. 7-8 in relation to a gross irregularity, Ntsebeza AJ stated:

“[7] An arbitrator commits a gross irregularity if in inter alia, his/her conduct is such that an inference can be drawn therefrom that the aggrieved applicant did not get a proper hearing. If for example a commissioner commits a very serious mistake in a manner that also reflects that he/she cannot be said to have applied his or her mind, his/her award is reviewable. (See County Fair Foods (Pty) Ltd CCMA (1999) 20 ILJ 2609 (LAC).)

A commissioner, furthermore, exceeds his/her powers if he/she makes findings that are not justified by evidence. If that is such that it leads him/her to draw inappropriate inferences, it would render an award reviewable.

[8] However, a mistake, however gross, is not misconduct. It must be so gross or manifest that it could have been made without misconduct before a court could justify drawing an inference that an arbitrator misconducted himself or herself. (See Hyperchemicals International (Pty) Ltd & another v Maybaker Agrichem (Pty) Ltd & another 1992 (1) SA 89 (W); Zaayman v Provincial Director: CCMA, Gauteng & others (1999) 20 ILJ 412 (LC), [1999] 1 BLLR 92(LC).)”

26. The applicant's complaints should be the basis of which the grounds of review are founded. However, the applicant's complaints do not support the grounds of review and do not suggest that the applicant did not

receive a proper hearing. Also, there is no ground of review to demonstrate a latent or manifest unlawfulness in the arbitration award.

27. Thus, there is no gross reviewable irregularity in the arbitration award and the Commissioner's conclusion is reasonable in terms of the evidence presented at arbitration. There is also no reason to interfere with the Commissioner's credibility findings, which appear to be justified.
28. Lastly, the applicant relied on the Labour Appeal Court judgment in Transnet Rail Engineering v Mienies & others [2015] 11 BLLR 1144 (LAC) as a defence and as a mitigation of sanction. This ties in with the applicant's request to work from home and later reintegrate into the workplace as a result of her medical conditions.
29. The third respondent granted the applicant extended sick leave from 20 May 2011 to 4 September 2011, the applicant then extended this leave by an additional two weeks. Upon her return to work, the applicant invoked the Wellness Policy and the third respondent's representatives held six meetings with the applicant to reduce the applicant's workload and to discuss other alternatives.
30. The third respondent's in-house doctor also communicated with the applicant's psychiatrist. The applicant's psychiatrist provided a report, which stated that the applicant's prognosis was good.

31. The third respondent further offered the applicant six months temporary disability leave to attend to her medical conditions, which the applicant rejected.
32. This facts of this application are distinguishable from the Transnet case, above, as the third respondent was reasonable in accommodating the applicant with extended sick leave, reducing her workload and offering the applicant an additional six months temporary disability leave.
33. Pertinently, at arbitration, the applicant did not address whether she would be able to cope with the reduced workload if she worked at home. Thus, the applicant's defence that due to her medical conditions the third respondent should have reasonably accommodated her request to work from home is unsustainable.

Conclusion

34. The applicant has not demonstrated reasons to review and set aside the arbitration award and the application should fail.
35. The usual order in this court is for each party to pay its own costs. There is no reason to depart from this practice.

Order

36. In the premises the following order is made:
- a. The application is dismissed.

- b. Each party to pay its own costs.

Saloojee, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Linda Erasmus

Instructed by: De Beer Minnaar Inc

For the Respondent: Pranisha Pillay

Instructed by: Cliff Dekker Hofmeyer Inc