



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 512/15

In the matter between:

BOKWA ATTORNEYS

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

LETSIE JEREMIA MOLEKI N.O

Second Respondent

CHANTELLE ANTIONETTE CHANDLER STRAUSS

Third Respondent

Heard: 2 May 2017

Delivered: 19 September 2017

JUDGMENT: REASONS FOR ORDER

MAHOSI AJ

Introduction

- [1] This is an unopposed application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award of the second respondent (“the arbitrator”) dated 12 February 2015 issued under the auspices of the first respondent (“CCMA”), under the case number FSBF 5402-12.
- [2] This matter was initially set down on the unopposed roll for the 24th of May 2016 on which date it was postponed *sine die* to enable the Applicant to file supplementary affidavit addressing grounds on which to have the arbitrator’s award reviewed and set aside. Having had regard to the substance of the matter, I issued an order in the following terms:
- ‘(a) The review application is dismissed.
- (b) There is no order as to cost.’
- [3] The applicant has since requested reasons for my order. What follows hereunder is a brief background to the application and the reasoning for the order.

Background

- [4] The third respondent was employed as a conveyancing secretary by the applicant from the 13th of October 2014 and she earned R9800.00 per month. Her contract of employment was subject to a four-month probation. On the 19th November 2014, the third respondent was dismissed for poor work performance. As a result, she referred an unfair dismissal dispute to the CCMA on the 27th of November 2014. The dispute was set down for con/arb that was scheduled for the 6th of January 2015. The dispute could not be resolved through conciliation and a certificate of non-resolution was issued. As a result, the matter proceeded to arbitration.
- [5] The arbitration was partly heard on the same day and finalised on the 9th of February 2015. At the end of the arbitration hearing, the arbitrator found the

¹ Act 66 of 1995.

third respondent's dismissal to be procedurally and substantively unfair. Dissatisfied with the arbitrator's award, the applicant launched this review application.

Arbitration and the award

- [6] In his award, the arbitrator identified the issue in dispute to be whether the third respondent's dismissal was unfair. The applicant led evidence through one witness, Mrs. Jacoba Dalina Hendrika Griebenov ("Ms. Griebenov") and the third respondent testified for herself. Ms. Griebenov testified that she was employed by the applicant for about 12 years as a receptionist and conveyancing secretary. According to her, a conveyancing process normally takes up to six weeks to be completed but she further stated that it might take less than six weeks if it was a cash transaction. Ms. Griebenov stated that she had not done conveyancing work with the third respondent and further that she could not remember any conveyancing transaction that was registered at the deeds office that was initiated by the third respondent except the one in which the purchase price was mistakenly paid into the applicant's trust account but later transferred into the transferring attorney's account.²
- [7] During her testimony, Ms. Griebenov was taken through a number of transfer documents that were prepared by the third respondent from which she identified different kinds of defects. Ms. Griebenov was of the opinion that the third respondent appeared to be confident in herself and what she was doing, as she did not ask for any help from her or any of the other secretaries in the office. Under cross-examination, Ms. Griebenov testified that when the third respondent was working for the applicant, there was no conveyancing attorney employed by the applicant. On the third respondent's duties, Ms. Griebenov confirmed that the third respondent's letter of appointment only stated the period of probation and that she will be generating deeds for conveyancing independently. Ms. Griebenov further confirmed that the said letter of appointment did not outline the third respondent's performance

² Record page 26, at para 25.

targets, the person responsible for her performance evaluation and how her performance will be evaluated.

- [8] The third respondent testified that there were a lot of conveyancing transactions she was processing when she was dismissed. She further testified that in her interview, she was not given clear performance targets, as there was no head of conveyancing department. According to the third respondent, she did her work to the best of her ability. At no stage was she made aware that she was performing below standard and she was never called to give representation as to why she should not be dismissed. The third respondent further testified that she was not provided with the applicant's code of conduct or a disciplinary code and she was further not subjected to any disciplinary hearing. All she received from the applicant was a letter of dismissal on the 21st of November 2014, which was dated the 19th of November 2014. On the defects that were on the transferring documents she was working on, the third respondent conceded that there were documents that were not signed and explained that it was due to human error and further that she was still working on others. The third respondent denied ever being called in by Mr. Bokwa for the purpose of evaluating her work performance.
- [9] In his analysis, the arbitrator started by outlining the provisions of section 188(2) and Schedule 8 of the Code of Good Practice: Dismissal of the LRA which deals with some of the key aspects of dismissal for reasons related to misconduct and capacity. Item 8 of Schedule 8 provides for the process to be followed prior to the dismissal of the employees who are serving a period of probation.³ The Code requires that the procedure leading to dismissal should

³ **8. Probation—**(1) (a) An employer may require a newly-hired employee to serve a period of probation before the appointment of the employee is confirmed.

(b) The purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment.

(c) Probation should not be used for purposes not contemplated by this Code to deprive employees of the status of permanent employment. For example, a practice of dismissing employees who complete their probation periods and replacing them with newly-hired employees, is not consistent with the purpose of probation and constitutes an unfair labour practice.

(d) The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment.

(e) During the probationary period, the employee's performance should be assessed. An employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service.

include an investigation to establish the reasons for the unsatisfactory performance and that the employer should consider other ways short of dismissal to remedy the matter. In addition, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee.

- [10] On the employer's requirement to advise the employee of the aspect in which the employer considers the employee to be failing to meet the required standard, the arbitrator considered the third respondent's testimony that she had no knowledge her alleged underperformance. The arbitrator further considered Ms. Griebenov's testimony that she was not aware of any formal meeting or evaluation process that took place between the applicant and the third respondent. In addition, the arbitrator did not believe that the applicant was justified to regard the third respondent as a poor performer on the basis that the third respondent already had transfer deeds that were already being

(f) If the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet the required performance standards. If the employer believes that the employee is incompetent, the employer should advise the employee of the respects in which the employee is not competent. The employer may either extend the probationary period or dismiss the employee after complying with sub-items (g) or (h), as the case may be.

(g) The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.

(h) An employer may only decide to dismiss an employee or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. A trade union representative or fellow employee may make the representations on behalf of the employee.

(i) If the employer decides to dismiss the employee or to extend the probationary period, the employer should advise the employee of his or her rights to refer the matter to a council having jurisdiction, or to the Commission.

(j) Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.

(2) After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has—

(a) given the employee appropriate evaluation, instruction, training, guidance or counselling; and

(b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.

(3) The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.

(4) In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee.

registered, one of which was recognised and confirmed by the applicant's witness.

- [11] The arbitrator was of the view that the applicant failed to prove that it acted in compliance with the Code of Good Practice: Dismissal in effecting the third respondent's dismissal and further that it failed to prove that there was a fair reason to dismiss her. As a result, the arbitrator found the third respondent's dismissal to be both procedurally and substantively unfair and ordered the applicant to pay the third respondent six months compensation.

Grounds of review

- [12] The applicant's grounds in this review application are tantamount to grounds of appeal. Instead of indicating in what respect the commissioner's award failed the reasonableness test, as enunciated in *Sidumo and Another v Rustenburg Platinum Mines and Others*,⁴ the applicant embarks on a recital of evidence that was led at the arbitration. In any event, the applicant's grounds of review are as follows:

- '9.1 The Second Respondent's decision is unreasonable in dialectical sense.
- 9.2 The Second Respondent failed to apply his mind to all the relevant facts and evidence placed before him during the arbitration proceedings.
- 9.3 The Second Respondent did not conduct a balanced and equitable assessment of all the evidence and failed to correctly apply the law, resulting in a decision that no reasonable decision-maker could reach.
- 9.3 The Second Respondent, in particular, failed to take into consideration item 8(1)(j) of the Code of Good Practice which determines that less compelling reasons for dismissal is required in respect of probationary employee.'

- [13] In its supplementary affidavit, the applicant did not supplement its grounds of review as ordered on the 24th of May 2016. Instead, the applicant restated the evidence that was led at the arbitration hearing, which according to it, was not considered by the arbitrator. The applicant argued that even if the dismissal is

⁴ 2008 (2) 24 SA (CC).

found to be procedurally and substantively unfair, the compensation granted is disproportionate to the dismissal.

Applicable Law and Analysis

[14] The arbitration awards are reviewable in terms of section 145 of the LRA, which provides that 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. Section 145(2) provides that:

- '(2) a defect referred to in (1), means-
 - (a) that the commissioner-
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed gross irregularities in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or
 - (b) that an award has been improperly obtained.'

[15] The applicant's contention is that the arbitrator failed to properly consider the evidence before him in arriving at his conclusion. The test for review which has been authoritatively stated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁵ was reiterated in *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*⁶ as follows:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls in one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry

⁵ 2007 (28) ILJ 2405 (CC).

⁶ 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013(34) ILJ 2795(SCA) at para 25.

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 fact, 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.⁷

- [16] The principles to be applied by the arbitrator in considering the fairness of dismissal for poor work performance were summarised by the Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine v Commission for Conciliation, Mediation and Arbitration and Others (Gold Fields))*⁸ as follows:

‘In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that the employee did not meet existing and known performance standards; that the failure to meet the expected standard of performance is serious; and that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Furthermore, the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee’s inability to do so and not due to factors that are outside the employee’s control.’

- [17] In this case, the applicant took issue with the arbitrator’s finding that the applicant failed to prove that it acted in compliance with the Code of Good Practice: Dismissal. It was the applicant’s submission that the arbitrator failed to take into consideration the fact that the third respondent never sought any assistance and carried on without seeking assistance; that Ms Griebenov could not remember a single Deed that was registered by the third respondent except one where money was paid into the applicant’s trust account but later transferred to the transferring attorneys bank account; that the third respondent admitted her error relating to one conveyancing transaction in which the transfer document was signed and the others where the Deeds of

⁷ At para 25.

⁸ [2014] 1 BLLR 20 (LAC) at para 25.

Sale had no signatures; that the third respondent failed to enquire about the applicant's code of conduct; that none of the conveyancing matters went through due to her speaking to the applicant's clients who took away work after she was dismissed; that the third respondent denied ever being asked about the problems in one of the conveyancing projects; that the third respondent specialised in conveyancing and further that she knew that she was expected to work independently. It is my view that the arbitrator considered all the abovementioned evidence.

[18] In his analysis, the arbitrator arrived at the finding that the applicant was not made aware of her non-performance after taking into consideration the third respondent's undisputed evidence that she had no knowledge of her alleged under-performance, as her performance was not evaluated. In fact, it is apparent that the applicant did not clearly set out the third respondent's performance standard except it's expectation of her to perform independently. If the applicant did, the third respondent did not know her performance targets and her performance was clearly not assessed. It was further apparent that, if there was any performance standard or target, there was no evidence on the seriousness of the third respondent's failure to meet such performance standard. In view of the LAC's judgment in *Gold Fields*,⁹ it follows that the applicant failed to prove (a) that the third respondent did not meet existing and known performance standards; (b) that the failure to meet the expected standard of performance is serious; (c) that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Furthermore, the applicant failed to demonstrate that the third respondent's failure to meet the standard of performance required is due to her inability to do so and not due to factors that are outside her control.

[19] It was the applicant's submission that the arbitrator failed to take into consideration that less compelling reasons for dismissal is required in respect

⁹ Ibid

of a probationary employee. In *Palace Engineering (Pty) Ltd v Thulani Ngcobo and Others*,¹⁰ the LAC stated as follows:

'The acceptance of less compelling reasons for dismissal in respect of a probationary employee as contemplated in item 8(1)(j) of the Code does not, in my view, detract from the trite principle that the dismissal must be for a fair reason. Even though less onerous reasons can be accepted for dismissing a probationary employee, the fairness of such reasons still needs to be tested against the stipulations of item 8(1)(a)-(h) of the Code of Good Practice. At the end of the day, the onus rested on the employer to prove that the dismissal was substantively fair. The conspectus of the evidence proved the opposite, that the dismissal was substantively unfair.'¹¹

[20] The arbitrator seems to have taken the view that, given the evidence by both parties that it may take about six weeks to have a Deeds of Transfer registered and further that there were transactions that were handled by the third respondent that were in a process of being registered, it could not be concluded that the third respondent was a poor performer. This is particularly so because the third respondent was dismissed after two months of her employment. There was no evidence that the few mistakes found in the deeds of sale were serious enough to warrant the third respondent's dismissal. In other words, given the evidence before him, the arbitrator did not find that there was a fair reason to dismiss the third respondent. It can, therefore, not be said that the arbitrator failed to have regard to all the material facts in this regard and to take into consideration Item 8(1)(j) of Schedule 8.

[21] The applicant further took issue with the arbitrator's finding that the applicant must pay the third respondent six months compensation. In relation to the applicant's argument concerning relief, the LAC in the recent case of *Kenco Engineering CC v NUMSA obo Members* stated as follows:

'A challenge to an order of the Labour Court awarding or refusing an employee compensation in terms of s193(1)(c) of the Act is not limited to the grounds applicable where an order is made pursuant to the exercise of a true

¹⁰ [2014] 6 BLLR 557 (LAC).

¹¹ At para 24.

discretion or narrow discretion. It is only in regard to the determination of the amount of compensation that the Labour Court or arbitrator exercises a true or narrow discretion. It is in regard to that decision that the powers of this Court is circumscribed and can only be exercised on the limited grounds. These grounds include the following: That the Labour Court or arbitrator (a) did not exercise a judicial discretion; or (b) exercised its discretion capriciously; or (c) exercised its discretion upon a wrong principle; or (d) has not brought its unbiased judgment to bear on the question; or (e) has not acted for substantial reason; or (f) has misdirected itself on the facts; or (g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. In the absence of one of those grounds this court has no power to interfere with the amount of compensation determined by the Labour Court.¹²

- [22] In this case, I am of the view that the applicant failed to show that the arbitrator did not pass a value judgment or that the discretion he exercised was capricious or founded on a wrong principle. As such, this Court has no power to interfere with the amount of compensation determined by the arbitrator.
- [23] From the reading of the arbitration award, it is abundantly clear that the arbitrator properly allowed the parties to state their cases and to lead evidence which evidence he considered and analysed before coming to the conclusion that the applicant failed to prove that the third respondent's dismissal was substantively and procedurally fair. As such, it cannot be said that the arbitrator failed to apply his mind to the relevant facts and evidence placed before him during the arbitration proceedings. It is my view that the applicant failed to show that the arbitrator, in exercising his discretion to award the third respondent six months compensation, reached a decision that a reasonable decision-maker could not reach.
- [24] Therefore, there is no basis for this Court to interfere with the arbitrator's decision. It was in light of these considerations that I ordered that the application to review the award issued by the second respondent under case number FSBF 5402-12 dated 12 February 2015 is dismissed. With regard to

¹² Case no JA/16 (heard on 16 March 2017 and delivered on 01 August 2017) at para 29.

costs, I was of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

D. Mahosi

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:

Adv. WJ van Wyk, Instructed by Bokwa
Attorneys