



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 790/15

In the matter between

JOHN PETER VAN DER MERWE

Applicant

And

COMMISSIONER GEORGE SHIBA

First Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Second Respondent

QUICKSURE (PTY) LTD

Third Respondent

Heard: 13 September 2017

Delivered: 27 September 2017

Summary: Commissioners may find sanction harsher than the one prescribed in the disciplinary code appropriate when there is evidence justifying deviation from the prescribed sanction. Absent evidence, the commissioner's decision that the harsher sanction is appropriate is unreasonable and defective as envisaged in section 145 of the Labour Relations Act 66 of 1995.

JUDGMENT

Lallie, J

Introduction

- [1] The applicant seeks an order, in terms of section 145 of the Labour Relations Act¹ (the LRA) reviewing and setting aside an arbitration award of the first respondent who will be referred to as the commissioner in this judgement. The application is opposed by the third respondent.

Factual background

- [2] The facts of this matter are not in dispute. They are that the third respondent conducts business in the financial services sector. It employed the applicant as a Claims Technician in February 2008. On 30 October 2014, the applicant was found guilty of being intoxicated on duty. Although the misconduct is dismissible at the third respondent, the applicant was issued with a final written warning on condition that he sought professional help. A further condition was that he would provide the third respondent's human resources manager with regular reports on the assistance he was receiving. A progress report the applicant submitted turned out to be false in that it was an attendance register which was signed by a caretaker of the venue where he received assistance and not his counsellor. He was charged with dishonesty and insubordination. He pleaded guilty to dishonesty and was found guilty based on his plea and dismissed. He was found not guilty of insubordination. He referred an unfair dismissal dispute to the second respondent Commission for Conciliation, Mediation and Arbitration (the CCMA). His dispute was arbitrated by the commissioner who issued an award in which he found his dismissal both substantively and procedurally fair. It is that award the applicant seeks this Court to review and set aside.

¹ Act 66 of 1995 as amended.

The award

- [3] The commissioner took into account the applicant's version that his dismissal was unfair because the sanction of dismissal was too harsh. He was charged with dishonesty, misconduct which fetched the sanction of a final written warning in terms of the third respondent's disciplinary code. He also considered the third respondent's version that the sanction of dismissal was fair because it conducts business in the financial services sector which requires its employees to conduct themselves with honesty and integrity. It also relied on the Financial Advisory and Intermediary Services Act ²(the FAIS) which also demands honesty and integrity from employees. It conceded that its disciplinary code distinguished between dishonesty and gross dishonesty but explained that the reason for dismissing the applicant was justified by aggravating factors which the chairperson of his disciplinary enquiry took into account. The reason for dismissing the applicant was also based on the irretrievable breakdown of the trust relationship between the parties. The commissioner made a finding that the sanction prescribed in the disciplinary code should generally be adhered to unless there are aggravating and mitigating factors which justify deviation. He accepted the third respondent's version that honesty and integrity are salient requirements of its environment and that the applicant dealt directly with finances of the third respondent's clients. He noted that although the penalty for dishonesty in the disciplinary code was a written warning, aggravating factors outweighed mitigating factors justifying deviation from the disciplinary code. He found that it would be irrational to expect the third respondent to trust the applicant with its client's finances after he acted with dishonesty. He accepted that the trust relationship between the parties had broken down irretrievably and concluded that the applicant's dismissal was both substantively and procedurally fair.

Grounds for review

- [4] The applicant's main ground for review is that the commissioner's decision that the sanction of dismissal was appropriate is unreasonable. It is based on the purported aggravating circumstances which justified deviation from the

² Act 37 of 2002

third respondent's disciplinary code which prescribed that dishonesty was punishable by a written warning. The applicant submitted that no evidence of aggravating circumstances was led both at the disciplinary enquiry and at arbitration. The commissioner's decision therefore, is not based on evidence. The third respondent conceded that the commissioner did not spell the aggravating circumstances out. They could, however, be inferred from evidence and the reasons the commissioner gave for his decision.

- [5] The applicant's case is in essence that, the commissioner erred in finding the sanction of dismissal appropriate. He should have found that the third respondent acted unfairly in not issuing the applicant with a written warning in terms of its disciplinary code in the absence of cogent reasons for deviating from the prescribed sanction. This Court may review an arbitration award if it is unreasonable. Errors which justify interference with arbitration awards are expressed as follows in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*³:

"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 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"

- [6] The test is approved in the following words in *Head of Department of education v Mofokeng and others*⁴:

"To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in

³ [2013] 11 BLLR 1074 (SCA) at para 25.

⁴ (2015) 36 ILJ 2802 (LAC) at para 32.

lawfulness, latent or patent irregularities and instances of dialectical reasonableness should be of such an order (singularly or cumulatively) as to a result in a misconceived enquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her”.

- [7] It is common cause that disciplinary codes are guidelines and not cast in stone. It is further common cause that the third respondent differentiates between dishonesty and gross dishonesty. The former is punishable by a written warning and the latter by dismissal. It is further common cause that the applicant was dismissed for dishonesty. The commissioner was therefore required to determine whether the third respondent's conduct of dismissing the applicant for dishonesty was fair. The applicant made himself guilty of dishonesty. The third respondent conceded that aggravating circumstances should exist before a sanction harsher than the one prescribed in its code could be justified. It was submitted on behalf of the third respondent that aggravating circumstances could be inferred from evidence. Defending the reasonableness of the award, the third respondent submitted that the reasons the commissioner gave for his decision cannot be faulted as the nature of its business requires a zero tolerance to dishonesty. It was further argued that there were no degrees of dishonesty as an employee is either honest or dishonest.
- [8] The applicant's argument is that the third respondent's version is untenable is correct. The third respondent created the distinction between dishonesty and gross dishonesty in its disciplinary code. It further prescribed different sanctions for the acts of misconduct. By prescribing the sanction of a written warning for dishonesty, the third respondent communicated to its employees the message that it tolerates dishonesty. No evidence of aggravating circumstances was led to prove that the gravity of the applicant's misconduct justified a sanction harsher than the written warning prescribed in the disciplinary code. The reasons the commissioner relied on for finding deviation from the disciplinary code justifiable are unreasonable because the third respondent decided, in its disciplinary code, that dishonesty is punishable by a written warning. The reasons on which the commissioner based his decision on the appropriateness of the sanction of dismissal are

disconnected from evidence. Absent aggravating circumstances, the decision that the dishonesty led to an irretrievable breakdown of the employment relationship between the parties is unreasonable. The commissioner erred in finding the sanction of dismissal appropriate. His error had the effect of rendering his decision unreasonable. The application must, in the circumstances, succeed.

- [9] The applicant sought an order substituting the award. It was argued on behalf of the applicant that he sought reinstatement or compensation. The applicant did not insist on reinstatement and having taken into account the circumstances surrounding his dismissal, I came to the conclusion that a continued employment relationship between the parties would not be tolerable. The appropriate relief would, in the circumstances, be compensation. I have taken into account the applicant's length of service of about seven years. His dismissal was substantively unfair. He was, however, not before the arbitrator with clean hands in that by his own admission, he made himself guilty of dishonesty. His disciplinary record was not clean in that he was on a final written warning for being intoxicated on duty. It is just and equitable in all the circumstances of this matter to grant the applicant compensation in the amount of R58 892.00 which is equivalent to remuneration he would have earned over a period of four months calculated at his rate of remuneration on dismissal which was R14 723.00 per month.

- [10] In the premises, the following order is made:

Order

1. The arbitration award issued by the first respondent under case number GAEK1520-15 and dated 31 March 2015 is reviewed and set aside and substituted with the following:
 - 1.1 The applicant's dismissal was substantively unfair.

- 1.2 The third respondent is ordered to pay the applicant compensation in the amount of R 58 892.00 minus the statutory deductions.

Z Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Mashiloane an official of UCCIMESHAWU

For the Third Respondent: Advocate Pottas

Instructed by: Van Heerden's Incorporated

LABOUR COURT