



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: C322/2016

In the matter between

DEPARTMENT OF HOME AFFAIRS

Applicant

and

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL
JUSTICE NEDZAMBA
NEPSAW obo NTHABELENG MOSHOESHOE**

**First Respondent
Second Respondent
Third Respondent**

Heard: 18 JUNE 2017

Delivered: 20 October 2017

Summary: Review application—hearsay evidence—records of the disciplinary hearing—test for review restated—application granted – no order as to costs.

JUDGMENT

MABASO, AJ

Introduction

- [1] This is an application to review and set aside an arbitration award by the second respondent, under the first respondent's case number GPBC 420-2015, which was issued on 10 December 2015.¹ This application was delivered out of the six weeks' period from the date of service and is accompanied by a condonation application. The latter application is unopposed.
- [2] In deciding the condonation application, this Court had to take into account the interests of justice. In a condonation application, some of the factors that have to be taken into consideration are degree of lateness, prospects of success, explanation advanced for the lateness, prejudice to the parties. I do not think that any of the Respondents will be prejudiced by the granting of the condonation application, as "*strong prospects of success may tend to compensate for a long delay*",² based on the order arrived at below, the condonation application is granted.
- [3] The applicant is the Department of Home Affairs (the applicant), the first respondent is the General Public Service Sectoral Bargaining Council (the Bargaining Council), the second respondent is Commissioner Justice Nedzamba (the arbitrator), and the third respondent is NEPSAW which is cited in its representative capacity as a trade union (the union), on behalf of Nthabeleng Moshoeshe (the employee). The Bargaining Council and the arbitrator, have not delivered opposing papers, only the third respondent has delivered an answering affidavit.

¹ Page 64, received by the applicant on 22 January 2016.

² *Melane v Santam Co Ltd* 1962 (4) SA 531 (A), *Van Wyk v Unitas Hospital and Others* 2008(4) BCLR 442 (CC) at para 20, *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC)

Relevant background/The arbitration

- [4] The employee was employed by the applicant as its Front Office Clerk until dismissed on 20 January 2015, following an outcome of the disciplinary hearing which found her guilty of the following offence,

"that [she] committed an act of misconduct in that on or about 30 October 2013 at or near the regional office: Cape Town, [she] unlawfully recorded the passport application of Mr Putlako Lefusa³ ID No.... without any DHA-73 Form completed or taken in as received before it was processed at live capturing as per the prescribed Departmental procedure".⁴

- [5] Following her dismissal, being assisted by her union, the employee referred an unfair dismissal dispute to the Bargaining Council which appointed the arbitrator to arbitrate the dispute between the parties as the conciliation yielded no positive results.⁵
- [6] According to the arbitration award, the following witnesses testified on behalf of the applicant: Mr Estiaan Bosch (Mr Bosch)-employed as a deputy director responsible for fraud and corruption, Mr Tsepo Mogoai (Mr Mogoai) was the applicant's Client Relations Officer, and Mr Bongani Ndimande (Mr Ndimande)-the chairperson of the disciplinary hearing. Only the employee testified in support of her case, against the aforementioned three witnesses of the applicant. After summarising the evidence of all these witnesses, the arbitrator ruled that the dismissal of the employee was procedurally fair but substantively unfair.⁶ He then ordered the applicant to reinstate the employee in the position that she occupied prior to her dismissal on the same terms and conditions of employment. The arbitrator further ordered the applicant to pay to the employee an amount of R140, 000 which is equivalent to 12 months of her salary.

³ Hereinafter referred to as "the client".

⁴ Records: page 75-76.

⁵ Section 191 of the Labour Relations Act 66 of 1995("the LRA").

⁶ Page 29.

[7] Before⁷ coming to this conclusion, the arbitrator said:

(a) "...The issue in dispute is whether or not the [employee] misconducted herself "by recording [the client's] passport application without any DHA-73 form completed or taken in".⁷

(b) That the admissibility of hearsay evidence had to be determined as "[the client] did not testify during arbitration",⁸ and according to him the reason for the client not to testify was that " ...it was not possible to secure [his] attendance since he had relocated to Johannesburg and has started a new employment. Attempt to have his testimony telephonically was not successful".⁹ The arbitrator accepted the client's affidavit. It is prudent to mention that, the arbitrator was wrong by saying the client did not testify, as the client did testify as appearing below, in paragraph 12.

[8] In the opening statement, the applicant stated that its case was that the employee failed to follow procedures when she processed the application for the passport and she worked with other fellow employees in manipulating the system, and there were documents to prove it.

[9] The arbitrator recorded common cause facts between the parties, which can be summarised as follows: that the charge is as appearing in paragraph 4 above. The issue in dispute was whether in recording the passport application the DHA-73 form was completed or taken in, according to the applicable rule¹⁰.

[10] The second witness was Mr Mogoai, who was responsible for overlooking applications and interacting with clients through floor walking. He came across

⁷ Page 27, para 39.

⁸ Page 27, para 40.

⁹ Records, page 73. Even the employee's representative was of the belief that the client did not testify.

¹⁰ It was common cause between the parties that this was a valid rule.

the client who had in his possession a handwritten slip which is part of the covering piece attached to the form, a copy of application "from the DHA-73 from which did not have a payment" and it did not have a payment slip attached to it.¹¹ According to Mr Mogoai, something was amiss, as the DHA 73 form has five sections, A-which is about particulars, B-to be completed by the Applicant's official, as it is a certification of particulars,¹² C, D and E. Then a passport's applicant would have to sign the declaration under section E confirming that he agrees with the terms on which the government is issuing the passport.¹³ For example *"if any of that on the record as well as the payment is missing then it is an incomplete application."*¹⁴

- [11] The version that was put to Mr Mogoai, during cross-examination, was that the employee was to submit that she followed the proper procedure in assisting the client, in that she completed the form and the client signed the form. This version was not disputed. Instead, this witness indicated that the application form was not available and the applicant's investigator tried to get it without success.
- [12] Despite the arbitrator's conclusion that the client did not testify, looking at the records clearly the client did testify, being assisted by an interpreter, and his testimony is captured as follows:

"EXAMINATION BY MR DIKANE: Can you please tell this tribunal as to what transpired when you came to apply for a passport on the day in question.

[INTERPRETER]:...he entered Home Affairs and at the front he meet a lady because he had 400 in hand to apply. Then the lady took him at the back.

¹¹ Records: page 86.

¹² Records: page 93.

¹³ Records: page 88 - 89.

¹⁴ Records: page 90.

COMMISSIONER: Just ask him to give you a chance to explain. We must say what he is saying. Don't allow him to call for long if you're going to forget, otherwise write down. What did she say?

[INTERPRETER]: He is saying he is tired. He had a busy night.

"[INTERPRETER]: the last part is like he can't remember what really happened because I was about to ask him it was really get the position whereby he was at the door, oh to the back to the other lady. Then I can't get exactly what in the court he says the lady took the ID number. Then after that to the computers but now I don't get exactly what happened there. I was about to ask what happened thereafter.

COMMISSIONER: Ok is that all?

[INTERPRETER]: Yes.

COMMISSIONER: All right. Ok. He can go.

MR DIKANE: Yes, we can close.¹⁵

- [13] The client was not cross-examined, and nothing was said about the statement that was allegedly made by him in respect of the case against the employee. Although the client testified after Mr Bosch's evidence in respect of the affidavit. Certainly, the arbitrator made an error in respect of the conclusion that the client did not testify. However, the impact thereof will be determined by the overall of the arbitration, taking into account that the applicant did not raise this as one of its grounds for review.
- [14] The first witness for the applicant was Mr Bosch who testified as follows: as a Deputy Director responsible for fraud and counter corruption investigations within the Western Cape Province¹⁶, he did an investigation against the employee,¹⁷ which this matter had been brought to his attention by Mr

¹⁵ Records: page 117 to 119.

¹⁶ Records, page 35.

¹⁷ Records, page 35-36.

Mogoai. He mainly relied on the client's affidavit,¹⁸ and what the client told him is that on the date in question he did not fill in any form nor append his signature to any paperwork, and according to him this was an irregularity as it was against the policy.¹⁹

- [15] Mr Bosch was cross-examined and referred to the disciplinary chairperson's report wherein the employee was found guilty.²⁰ It was put to this witness that the DHA-73 was completed by the employee.²¹ Mr Bosch confirmed this. However, he said the form was only completed after the client had spoken to his brother and he had to go back for the receipt, meaning at the time when the application for the passport was made, no form had been completed.²² Mr Bosch further testified that the completed form would have a portion of the client's signature, the one that was presented before the arbitrator was *"only a top part of there is more forms underneath so it is only the top part that you can easily tear off."*²³
- [16] The employee's version that was put to Mr Bosch was that the form was completed by her at the time of the application and it was given back to the client to take it to the cashier. Mr Bosch confirmed that it is not irregular for an official to complete the form but it must be signed.²⁴

Grounds for review

- [17] Taking into account that, the issue before the arbitrator was whether or not the employee submitted and / or processed the application for a passport without the DHA-73 form being completed and submitted, I deem it prudent to concentrate on the grounds of review relating to this issue, as set out below.

¹⁸ Records, page 48 – 50, 58-59.

¹⁹ Records, page 40,45, 46, 65,66, 82,209.

²⁰ Records, page 56.

²¹ Records, page 76.

²² Records, page 79-83

²³ Records: page 84.

²⁴ Records, page 83.

- [18] The applicant asserted that the arbitrator committed a reviewable irregularity by disregarding and/or failed to attach sufficient weight to the evidence of Mr Mogaoi in that the client was supposed to have signed part B which is a declaration part and not a photo of the DHA-73 form as submitted by the employee .
- [19] That the arbitrator committed a reviewable irregularity, in concluding that the client " was not present at the hearing to clarify whether he had signed on the photo side of the form or whether he had signed where the photo booth is" , and made assertion that the affidavit of the client pointed out that the client did not fill in any form or document and also did not sign any paperwork, and that Mr Ndimande recorded the evidence of the client, during the hearing, that the client indicated that he did not sign any manual application form.²⁵
- [20] It is the applicant's assertion that the arbitrator misconstrued the evidence of Mr Bosch, who was the investigator, and his assumption was that the form that was completed, which was presented before the arbitrator was completed " not for the sake of application" but " was in all probability then completed after the fact". It needs to be mentioned that this cannot be a valid ground to review and set aside the award, taking into account that this witness was an investigator. I have also taken into account that it was common cause between the parties that the full set of forms was not presented before the arbitrator, the only part that was presented was the one that was completed by the employee.²⁶
- [21] The applicant further asserted that the arbitrator in summarising the evidence of the proceedings, in discrediting Mr Ndimande of the applicant, he relied on evidence that was not before him.²⁷

²⁵ Founding affidavit, page 15 to 17. Supplementary affidavit, page 37-39, para 7 -9. Records: Bundle A, page 186.

²⁶ Supplementary affidavit, page 39 -40.

²⁷ Founding affidavit, para 25.

- [22] That the arbitrator misconstrued the question before him, as he held that “*the bone of contention is that the form was partially completed*”²⁸, as the applicant’s case was that there was no completed application form on behalf of client.”²⁹ I am of the view that the arbitrator cannot be faulted in concluding that the bone of contention was that the form was partially completed. This ground is baseless.

Legal principles and application thereof

- [23] In *Herholdt*³⁰ the Supreme Court of Appeal held:

“ ... [A] defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have ... 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.” (Own emphasis)

- [24] Soon after the *Herholdt* judgment, the LAC in *Anglo’s matter*³¹ enunciated thus,

“In *Herholdt*, which endorsed and clarified the operation of the Sidumo test, the SCA emphasised that an award of an arbitrator will only be set aside on review if both the reasons and the result are unreasonable. It held that in determining whether the award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and

²⁸ Founding affidavit, para 26; arbitration award, para 43.

²⁹ Founding affidavit, para 26. See also supplementary affidavit, para 12.

³⁰ *Herholdt v Nedbank Ltd* [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA). (*Herholdt*).

³¹ *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer* [2015] 4 BLLR 394 (LAC).

consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification on all the material before the arbitrator, including for reasons not considered by the arbitrator. The SCA in Herholdt further held that the result of an arbitrator's award will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator. It follows from this that an arbitrator's award will be reasonable when there is a material connection between the evidence and the result, or, put differently, when the result is supported by some evidence.³²(Own emphasis)

- [25] The applicant as the employer who dismissed the employee, had the onus of proof to show that the dismissal of the employee was both procedurally and substantively fair.³³ The case for the applicant revolved around (a) the client's affidavit, (b) the investigation that was done by Bosch and (c) the subsequent disciplinary hearing records, which had been presented before the arbitrator. Based on this the question that has to be answered is whether the arbitrator committed reviewable irregularity and in deciding this issue, one has to take into account all the material that was correctly placed before the arbitrator.

The affidavit and disciplinary records

- [26] Hearsay evidence, which the arbitrator relied upon, is regulated by section 3 of The Law of Evidence Amendment Act³⁴, and it can be admitted as evidence

³² Ibid, para 11.

³³ ss 192(2) of the LRA.

³⁴ Act 45 of 1988. "3. (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

if *inter alia* is by consent or the presiding officer decides to take into account any other factors which in his opinion have to be taken into account .

- [27] In terms of the provisions of section 138 of the LRA, the arbitrator had the leeway to deal with the matter the way he deemed fit, and one of the conditions was that both parties enjoy fair trial of issues. In *CUSA v Tao Ying Metal Industries & others*, the CC³⁵ held that,

*"Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do."*³⁶

- [28] The arbitrator decided to accept the client's affidavit as hearsay evidence, and before this Court, parties were not challenging the arbitrator's conclusion in that he accepted this affidavit despite the client's testimony where amongst other things he said "***can't remember what really happened***", and that the

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

³⁵ [2009] 1 BLLR 1 (CC)

³⁶ Ibid, at para 65.

arbitrator made an error in that the client did not testify whereas he did testify as mentioned above.³⁷

- [29] Taking into account that the arbitrator in accepting the affidavit of the client concluded that *"in the interest of justice I have decided to admit [the client's] affidavit"*³⁸. It is also important to mention that before coming to this conclusion, the arbitrator made the following comments in respect of argument before him:

"Mr Sonjica argued that I should not admit [client's] affidavit and Ndimande's evidence on the basis of it being hearsay evidence. While I accept that Dimande's evidence and Lefusa's affidavit constituted hearsay evidence, I consider that the exceptions stipulated in section 3 of the Law of evidence Act 45 of 1988."³⁹ (Own emphasis)

- [30] The arbitrator in the award does not state as to whether or not he accepted the evidence of Mr Ndimande despite stating that it was hearsay evidence, instead he only expressly accepted the affidavit. However, he acknowledged that Mr Ndimande testified and he *'wrote through his findings in respect of the hearsay evidence at the hearing. He also read through [client's] statement'*. It

³⁷ *Ndhlovu and others v S* [2002] 3 All SA 760 (SCA), at para 29, the SCA held as follows, regarding hearsay evidence: Second and in any event, the literal reading entails that a hearsay statement automatically becomes admissible simply because the extra-curial declarant happens to testify, regardless of the content of his or her testimony, and regardless of the interests of justice. It is hardly conceivable that the legislation intended this result. When hearsay evidence is tendered, the person on whose credibility the probative value of the hearsay depends may

(i) testify and confirm its correctness;

(ii) not testify;

(iii) testify but deny ever making the hearsay statement;

(iv) testify and admit making the statement but deny its correctness;

(v) testify but neither confirm nor deny making the statement.

[30] If the witness, when called, disavows the statement, or fails to recall making it, or is unable to affirm some detailed aspect of it (situations (iii)-(v) above), the situation under the Act is not in substance materially different from when the declarant does not testify at all. The principal reason for not allowing hearsay evidence is that it may be untrustworthy since it cannot be subjected to cross-examination. When the hearsay declarant is called as a witness, but does not confirm the statement, or repudiates it, the test of cross-examination is similarly absent, and similar safeguards are required.

³⁸ The arbitration award: para 41.

³⁹ *Ibid*, at para 40.

is trite law that in deciding a review application, one has to take into account the totality of the evidence that was properly before the arbitrator and the award which is under review.

- [31] Arbitration hearings are *de novo* hearings, and the disciplinary records are not automatically regarded as evidence before forums such as CCMA. *In casu*, the employee's representative did cross-examine the applicant's witnesses on disciplinary records, as correctly pointed out by the arbitrator that Ndimande placed before him what the client said during the disciplinary hearing, therefore, the arbitrator was bound to take into account such evidence.

Conclusion

- [32] I conclude that the arbitrator did understand the issue before him in that the bone of contention was that the form was partially completed, I say this because it was not disputed that the employee had a right to complete the form on behalf of the client, as to when did the employee complete the form, none of the witnesses could testify on that except the employee who indicated that the form was completed before the application could be submitted.
- [33] The only issue in respect of the completion of the form was that it was the evidence of Mr Mogoai that failure to sign the application form amounts to an incomplete application. Therefore, the evidence before the arbitrator which was presented by way of an affidavit, Mr Ndimande, and the disciplinary records pointed to one direction that the client did not complete the application form, as required by the policy of the applicant, such policy was not in dispute. Taking into account the charge which the employee was dismissed for, the evidence presented before the arbitrator, the conclusion by the arbitrator that there was no evidence supporting that the client signed at the photo booth, and that "*Ndimande is not in a position to testify what[the client] meant by "photo side" ...[the client] never told him what he meant*". The arbitrator failed to apply his mind to the issue of the disciplinary records, which was material to the determination of the fairness of the dismissal. Therefore, it cannot be

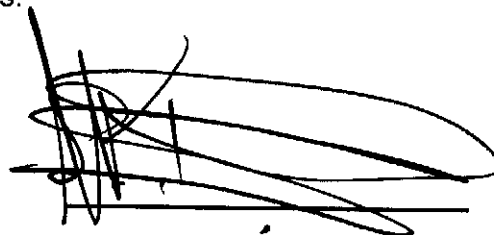
said that there was a fair trial of issues. Based on these, his conclusion is one a reasonable decision-maker could not have made taking into account the totality of the evidence that was properly presented before him.

- [34] Considering that the arbitrator did not give the parties, especially the employee's representative, an opportunity to cross-examine the client as the author of the affidavit, therefore, I am of the view that order 3 below would be appropriate.

Order

- [35] In the circumstances, the following order is made:

1. The Applicant's application for the late delivery of the review application is granted.
2. The arbitration award issued by the Second Respondent under the first respondent case number GPBC 420-2015 is reviewed and set aside.
3. The unfair dismissal dispute between the Third Respondent and the Applicant under the First Respondent case number GPBC 420-2015 is remitted to the First Respondent to be arbitrated *de novo* before a different Commissioner within 30 days.
4. There is no order as to costs.

A handwritten signature in black ink, consisting of several overlapping loops and strokes, positioned above the printed name of the judge.

S. Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Adv L Dzai

Instructed by:

C Bailey (State Attorney, Cape Town)

For the Respondent:

Adv C Bosch

Instructed by:

M Funeka Attorneys

LABOUR COURT