



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 2246/14

FIDELITY SECURITY SERVICES (PTY) LTD

Applicant

and

SATAWU obo ZONKE RICHARD

First Respondent

& 5 OTHERS

CCMA

Second Respondent

PULENG JOYCE MADUNA N.O.

Third Respondent

Heard: 30 November 2017

Delivered: 1 February 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application in terms of s 145 of the LRA to review and set aside an arbitration award issued by the third respondent (the arbitrator) on 8 September 2014. In her award, the arbitrator ordered the applicant to reinstate the second and further respondents (the employees) with retrospective effect, with no order as to costs.
- [2] The dispute was previously the subject of an application for review. On 22 April 2014, the court had before it an application to review an award dated 26 July 2011. In that award, commissioner R McGregor dismissed the individual respondents' referral of an unfair dismissal claim. An order was granted to the effect that the award be reviewed and remitted to the CCMA for rehearing. The basis for that order is not apparent. The dispute was duly remitted and the matter reheard by the arbitrator, whose award is the subject of these proceedings.
- [3] In her award, the arbitrator records, correctly, that it is incumbent on the applicant to establish the fairness of a dismissal, once the existence of a dismissal had been established by the individual respondents. The undisputed evidence was that in March 2011, one of the applicant's clients (ABI) had terminated a contract to provide security services, at a site in Bedfordview on which the individual respondents were engaged. The applicant's case was that the individual respondents' contracts of employment provided for the termination of their employment in the event that the applicant was unable to place them at a suitable post. The applicant's version was that given that there were no other vacancies in the region at the time, consultations were held with representatives of the individual respondent but that they refused to accept any alternative positions that were offered to them. In those circumstances, their employment

was terminated. The individual respondents denied having been offered alternative employment (i.e. employment on a different site) or that they had refused it. The arbitrator went on to find that fair procedure had been followed but came to the following conclusion:

38. As far as substantive fairness is concerned it was testified that the employer refused to retrench the employees when it could not find alternative sites for them but chose to dismiss them without any reason and without even acknowledging the lengthy years of service the applicants gave to the company. I therefore find that the applicant's dismissal was substantively fair.

- [4] This is the full extent of the arbitrator's reasoning in relation to substantive fairness. The applicant contends that in coming to the conclusion she did, the arbitrator made findings that are not rationally connected to the evidence that served before her. Specifically, the applicant contends that the arbitrator failed to apply her mind to evidence that the individual respondents were offered alternative positions and in fact instructed to report to other sites, but that they failed to do so.
- [5] The applicable legal principles are well-established. This court is entitled to interfere with an award made by a commissioner if and only if the commissioner misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)). In other words, the test is two-staged. First, the applicant must establish a misconception of the nature of the enquiry or some misconduct or misdirection on the part of the arbitrator. If that is established, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons

of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.

[6] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC)), the Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process-related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgement). Specifically, the questions for a review court to ask is whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with a substantial merits of the dispute and whether the decision is one that another decision-maker could reasonably have arrived at based on the evidence (see paragraph 20). So, when arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

[7] It does not appear to have been in dispute that the terms of the individual respondents' contracts provided that subject to an obligation to endeavour to place the individual respondents in alternative posts, the contracts would terminate in the event that the individual respondents were to be removed from a site at the instance of a client (see paragraph 4 of the award 'Issues of common cause'). There was evidence, in the form of the letters of termination dated 6 April 2011, each of which had been endorsed 'alternative rejected'. Further, in respect of some employees, there was evidence of correspondence making specific reference to transfers to the Robertsville office, with placement at either at UJ or

Mogale City sites. Indeed, one of the documents put to Makubela (which he could not adequately explain) was a letter dated 7 April 2011, addressed to a Mr Ndlovu, offering him a transfer to Mogale City. That offer was accepted, and the acceptance endorsed by Mr Zane, the shop steward who had been representing employees during the consultation process. All of these documents serve to corroborate the applicant's version. Further, paragraphs 5.4 and 5.5 of the individual respondent's heads of argument in the first review application were put to Makubela. These state, as a matter of common cause:

5.4 Subsequent to the above there were discussions and consultations and finally the individuals second applicants were all offered alternative employment.

5.5 The individual second applicants refused to accept the offer of alternative employment and this led to the termination of their contract.

- [8] The arbitrator makes no reference to any of this evidence, nor does she provide any reasons for rejecting it.
- [9] The arbitrator's reasoning (as far as it can be ascertained from paragraph 38 of the award) is that the dismissals were substantively unfair because (a) there was evidence that the applicant had refused to retrench the individual respondents when it could not find alternative sites for them; (b) the applicant chose to dismiss the individual respondents without any reason; and (c) the applicant did not acknowledge the individual respondents' length of service. This finding flies in the face of the evidence that served before the arbitrator. The 'refusal to retrench' was not in issue – it was accepted by the parties as common cause that the individual respondents' contracts provided for termination in the event that the employee was removed from a site and no alternative sites were available. There was no evidence that the individual employees were dismissed 'without any reason'. The reason for dismissal was articulated by the applicant's witnesses, and those of the individual respondents who testified were under no misapprehension as to why they had been dismissed. Given that the arbitrator did not consider the dispute to be one that concerned a retrenchment or a claim of severance pay, the individual respondents' length of service had no bearing on

the substantive fairness of their dismissal. In any event, the arbitrator had found that the applicant had followed a fair procedure prior to the notices of termination of employment being issued. Specifically, the arbitrator rejected the version proffered by the individual respondents to the effect that there had been no consultation with the union. This finding is consistent with the documentary evidence that served before the arbitrator, in the form of minutes of the meetings concerned. In short, the arbitrator's reasons for her finding of substantive unfairness do not sustain the conclusion to which she came. On balance, the evidence supports the conclusion that the applicant was entitled to terminate the employment of the individual respondents in the event that it was unable to find alternative employment for them, and that after proper consultation with a trade union representative present, the individual respondents were offered alternative posts which they refused.

- [10] There is a further point that requires consideration. It would appear from the record that at the commencement of the arbitration proceedings, the applicant's representative raised a jurisdictional point. That point was to the effect that the reason for dismissal was one related to the applicant's operational requirements and that in those circumstances, given the number of employees dismissed, the CCMA did not have jurisdiction to entertain the claim, which ought to have been referred to this court. The CCMA's lack of jurisdiction was the primary basis on which the respondent sought to have commissioner MacGregor's award reviewed. In the founding affidavit filed in that application, the deponent to the affidavit (who is an individual respondent in these proceedings and who testified during the proceedings under review), was scathingly dismissive of commissioner McGregor's failure to make a jurisdictional ruling to the effect that the real reason for dismissal was one related to the applicants operational requirements. Indeed, he goes so far as to say the following, at paragraphs 28 and 29 of the affidavit:

28. The applicants submit that a particularly disturbing feature was the fact that the second respondent pretended that the jurisdictional issue did not exist, and went on unperturbed with a determination of the matter, notwithstanding his finding that there was a dismissal and that the same could not be classified as

other than one for operational requirements, i.e. a 'retrenchment as it is referred to in ordinary pylons. No, he swept the matter under the carpet even though he addressed and determined the ancillary issues of a) with alternatives to the retrenchment existed and were explored, b) what the applicants response to them was, c) whether a consultation procedure on the retrenchment was held, and d) with the way the applicants dealt with the alleged alternative offers disqualified them from receipt of severance pay or not. All the aforesaid elements proving that the second respondent had knowingly immersed himself fully in a retrenchment related dispute just disable by this Honourable Court, and yet simply went ahead with the matter as if he could have arbitrated it

29. I thus submit, on my behalf and on behalf of my co-applicants as well, that the said fact alone vitiates the second respondent's award so comprehensively as to call for it to be set aside by this Honourable Court at once, with a punitive cost order against the third respondent hearing in the event it seeks to oppose this application without any reasonable, as opposed to a frivolous or vexatious, basis.

- [11] It would appear that the arbitrator dismissed the jurisdictional point on the basis it seems that the matter had been remitted by this court for rehearing, and that she was not in a position to fail to comply with the order. This is, of course, incorrect, since a jurisdictional point may be raised at any stage of proceedings and further, because the terms of the order remitting the dispute could never confer jurisdiction on the CCMA if it had none. It was incumbent on the arbitrator to determine the real nature of the dispute and to conduct the arbitration proceedings accordingly. It would seem to me from a reading of the record that the real reason for dismissal was one related to the applicants operational requirements and that the jurisdictional point order accordingly to have been upheld. Be that as it may, the applicant has not directly sought to review any jurisdictional ruling made by the arbitrator and in view of my finding on the merits of the review application, it is not necessary for me to take the matter any further.
- [12] In successful review applications, this court ordinarily exercises a discretion to either remit the matter to the CCMA for rehearing, or substitute the commissioner's finding for one that is appropriate. The source of this discretion is

s 145 (4) of the LRA, which provides that this court may either 'determine the dispute in the manner it considers appropriate' or 'make any order it considers appropriate about the procedures to be followed to determine the dispute. The court ordinarily takes into account whether the result is a foregone conclusion, whether any prejudice would be caused to the applicant by any further delay, whether the decision-maker has exhibited bias, and whether the court is in as good a position to make the decision itself. In *Palluci Home Depot (Pty) Ltd Heskowitz and others* [2015] 5 BLLR 484 (LAC) the LAC said the following, at paragraph 58:

Where all the facts required to make a determination on the disputed issues before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court is in as good a position as the administrative tribunal to make the determination, see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the paths of the Labour Court under s 158 of the LRA, which primarily directed at remedying a wrong, and providing effective and speedy resolution of disputes. The need for bringing a speedy finality to labour dispute is thus an important consideration in the determination, by a court of review, of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner.

- [13] The court has before it all of the relevant material and little point would be served by remitting the dispute to the CCMA for rehearing. As I have indicated, the evidence suggests that on the probabilities, the dismissal of the individual respondents was substantively fair. Further, the interests of expeditious dispute resolution would be best served by an order of substitution. The present matter has its roots in dismissals effected in 2011, some seven years ago. It is in the interests of all concerned and in the interests of justice that there be no further delay in bringing the matter to finality. I intend therefore to substitute the arbitrator's award with a ruling to the effect that the referrals to arbitration are dismissed
- [14] Finally, in relation to costs, this court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and

fairness. This court conventionally does not make costs orders in matters involving collective-bargaining partners and it seems to me that the requirements of the law and fairness will be best served by each party bearing its own costs.

I make the following order:

1. The arbitration award issued by the third respondent under case number GAEK 3250-11 on 8 September 2014 is reviewed and set aside.
2. The award is substituted by the following:
‘The applicants’ referral is dismissed.
3. There is no order as to costs.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Mr C Crafford, Crafford Attorneys

For the first respondent: Union official