



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case no: JR 818/17

In the matter between:

NKUNZI PHARMACEUTICALS (PTY) LTD

Applicant

And

**THE NATIONAL BARGAINING COUNCIL
FOR THE CHEMICAL INDUSTRY**

First Respondent

COMMISSIONER DIALE NTSOANE N.O.

Second Respondent

GIWUSA obo BARBARA RAMASEDI

Third Respondent

Heard : 06 February 2018

Delivered : 15 February 2018

Summary: Review of arbitration award in terms of s145 of Labour Relations Act, 66 of 1995 – Whether decision that dismissal not appropriate as sanction could not reasonably be reached on available evidence decided as main question - Whether evidence existed to justify award of demotion in the place and stead of dismissal decided as ancillary question – Both questions decided

in the negative – Non-existence of demotion post contemplated by award raised only on review – Award set aside and matter remitted for hearing *de novo*.

JUDGMENT

LEKALE, AJ

BACKGROUND & INTRODUCTION

- [1] Ms Barbara Ramasedi, a union member and the third respondent in the instant matter, was employed by the applicant as a packer from July 2006 until 20 September 2016 when she was dismissed following a disciplinary enquiry into allegations of, *inter alia*, gross misconduct relating to failure to check and ensure that information on medication and expiry dates correspond levelled against her.
- [2] The union member, who was represented by her trade union, felt aggrieved by the dismissal and referred the dispute to the first respondent for resolution. When the matter remained unresolved after an unsuccessful attempt at conciliation the dispute was referred to arbitration at the request of the third respondent. The matter eventually served before the second respondent in his capacity as the arbitrating panellist of the first respondent.
- [3] The second respondent eventually issued an award on 17 March 2017 in terms of which he found that dismissal was not appropriate as a sanction and awarded the union member re-employment **“in a position lower than the one she occupied prior to her dismissal.”**
- [4] The applicant employer takes issue with the award and now approaches the court in terms of section 145 of the Labour Relations Act No. 66 of 1995 (“the LRA”) for an order setting aside and replacing the award in question.
- [5] The third respondent filed opposing papers outside the time limited by the court rules for such a purpose and applied unsuccessfully for condonation of the delay involved. The matter, thus, effectively proceeded before me on 6 February 2018 on an unopposed basis in the absence of the third

respondent although the union was notified of the date of the hearing by the office of the Registrar of this court on 23 January 2018.

ISSUE FOR DETERMINATION

- [6] The parties are at variance on whether or not the impugned award is reviewable on the grounds that the same could not reasonably be arrived at on the material properly before the second respondent with specific reference to the finding that dismissal is not appropriate as a sanction and a demotion awarded in its place and stead.
- [7] In the event of the foregoing question being decided in the affirmative, I am requested by the applicant employer to set the award aside and to substitute the same with an order declaring the dismissal to be substantively fair. I am, further, requested to saddle the first and second respondents with costs on the basis that the latter ignored the evidence properly before him and assumed, without any factual basis whatsoever, that it was possible to demote the union member to a position lower than the one she occupied before dismissal.

DEPOSITIONS AND CONTENTIONS FOR THE APPLICANT

- [8] The applicant's chief executive officer ("the CEO") deposes, *inter alia*, to the effect that the union member pleaded guilty to serious misconduct relating to mislabelling of heart medication with potential fatal consequences had the product left the applicant's premises.
- [9] He, further, points out that the costs of damages were around R 950 000.00 (nine hundred and fifty thousand rand). The second respondent found no fault with the conviction but failed to find that the dismissal was an appropriate sanction. In his view, the second respondent misconducted himself and committed a gross irregularity in that he, *inter alia*, did not properly apply his mind to the evidence before him and exceeded his powers in making the relevant award.
- [10] He, further, feels that the first and second respondents should be saddled with costs because the latter deliberately ignored relevant evidence as well

as the fact of the absence of evidence regarding whether or not it would be possible to demote the union member to some unknown lesser position. The second respondent, in his opinion, unjustifiably interfered with the internal workings of the applicant and without any authority sought to change the applicant's organisational structure.

- [11] In argument on papers and before the court Ms Duvenage submits for and on behalf of the applicant, *inter alia*, to the effect that it was impossible for the applicant to comply with section 145(7) read with section 145(8) of the LRA by furnishing security because no position lower than the one the union member occupied at the relevant time exists and, as such, the amount of security could not be determined.
- [12] In the view of the applicant's attorney it is simply incompetent and impossible to enforce and comply with the award as no position contemplated by the same exists. The second respondent, further, based his finding of unfair dismissal on inconsistent application of discipline and, therefore, ignores the evidence properly before him clearly indicating that the applicant was not guilty of any contemporaneous inconsistency in that the union member faced disciplinary charge which differed from that which her colleague, who also pleaded guilty, faced and was convicted on.
- [13] On costs Ms Duvenage painstakingly submits, *inter alia*, to the effect that the second respondent was biased in favour of the union member and acted maliciously to the unjustified detriment of the applicant. That the second respondent committed a gross dereliction of duties vested in him by section 138 of the LRA. In her view the applicant suffered severe prejudice in having to bring the instance application regard being had, *inter alia*, to the costs associated therewith. The first and second respondents should, therefore, carry the costs in line with case law *in pari materia*.

APPLICABLE LEGAL POSITION

- [14] In the instant application the test is whether or not the impugned decision was one that a reasonable decision-maker in the position of the second respondent could not have reached on available evidence.¹
- [15] The parity principle is applied with caution by the courts and does not apply rigidly and unreasonably for sanction purposes where there are sound reasons for distinguishing between employees guilty of same or similar infractions such as different sets of personal circumstances. Each case is decided on its own facts and circumstances regard being had to the requirement for individualisation of sanction and/or punishment in our law.²
- [16] It is possible to order reinstatement or re-employment in a reasonably suitable work other than the position in which the aggrieved employee was employed prior to dismissal on any terms.³
- [17] Anyone considering the substantive or procedural fairness of the dismissal is obliged to take into account any relevant code of good practice issued in terms of the LRA.⁴
- [18] Reinstatement or re-employment is not a primary or compulsory relief on the part of the Labour Court or the arbitrator where the circumstances surrounding the dismissal are such that continued employment relationship would be intolerable to the parties.⁵
- [19] As a general rule a costs order is not competent and appropriate against a judicial officer exercising his or her judicial or quasi-judicial functions where he/or she made a judgment that is wrong or incorrect on the facts and/or in law unless such officer acted in bad faith.⁶

APPLICATION OF LEGAL POSITON AND FINDINGS

¹ See *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 28 ILJ 2045 (CC) at paragraph 110.

² See *Absa Ltd v Naidu* [2014] 35 ILJ 102 (LAC).

³ See section 193(1)(b) of the LRA.

⁴ See section 188(2) of the LRA.

⁵ See section 193(2) of the LRA.

⁶ See *Regional Magistrate Du Preez v/s Walker* 1976 (4) SA 361 (A) and *CCMA & Another v/s Inzuzu IT Consulting (PTY) Ltd & Another* case number PA 9/10 an unreported Labour Appeal Court decision).

- [20] A perusal of the impugned award reveals that the second respondent, in fact, did not base his decision as to the appropriateness or otherwise of dismissal as a sanction on alleged inconsistency insofar as he effectively and correctly found that **“[e]ach case must be treated according to its own merits. If the merits dictate that dismissal will be appropriate sanction, it should just be imposed.”** He, in fact, found that the applicant took disciplinary action against the union member’s fellow co-employee but found that his personal circumstances called for a different sanction.
- [21] It appears, in my view, that in our jurisprudence parity principle as expressed in the requirement for consistent application of discipline applies rigidly only to the taking of disciplinary action against all employees suspected of breach of same or similar disciplinary rules and not to disciplinary sanctions regard being had to the requirement for individualisation of sanctions.
- [22] In this regard, it should be recalled that once the presiding officer has returned a guilty disciplinary verdict, fairness dictates that he takes both aggravating and mitigating circumstances into consideration when determining an appropriate sanction. If fairness as expressed in the principle of parity demanded that all employees convicted of the same or similar infractions be dismissed regardless of their differing personal circumstances the enquiry would end as soon as the disciplinary guilty verdict is returned.
- [23] The second respondent, further, found that the union member was remorseful and that taking her back in another position would reduce and render the chances of her committing the same mistake remote. In his view the loss incurred and the potential for harm to human life would be removed if she was demoted. The second respondent was obviously and correctly alive to the concession made by the union member under cross-examination to the effect that she could no longer be trusted to do her job as well as its implications insofar as he awarded her demotion. In this regard it is worth keeping in mind that when an employee cannot be trusted by her employer, continued employment relationship would generally most probably be intolerable to the parties.

- [24] The second respondent took the view that if the union member was demoted to a lower position requiring constant supervision the risk of her committing the relevant mistake would be reduced. In my view what he, however, lost sight of was the fact that there existed no evidence whatsoever before him to suggest that such a position existed on the applicant's organogram. The possibility of a demotion was only alluded to under cross-examination of the union member when the applicant's representative asked her whether she would continue to make the same mistake if the applicant decided to demote her.⁷
- [25] The existence, nature and job description of such a lower position were not investigated before the second respondent. It would, in my view, have been reasonable and prudent to establish details about such a position in order to avoid placing unreasonable burden on the applicant to go an extra mile to accommodate the employee it no longer could trust to perform her duties in the position she occupied. A position requiring constant supervision *prima facie* requires the applicant to place someone over the union member's shoulders, with possible additional costs, to ensure that she performs her duties properly. The applicant's capacity to do so was simply not established.
- [26] The second respondent's decision in this regard is, therefore, not in line with the evidence properly before him and is the one that a reasonable decision-maker could not make on available evidence.
- [27] The applicant effectively asks for costs against the first and second respondents as a punitive measure. The question in this regard is whether or not the second respondent acted maliciously in making the impugned award.
- [28] I am not persuaded by the recorded evidence and the impugned award that the second respondent acted in bad faith. In this regard it shall be noted, as pointed out above, that it was the applicant's representative who first mentioned demotion during the arbitration hearing. The personal circumstances of the union member and the facts from which the second respondent drew the conclusion that she was remorseful where before the

7 See page 98 lines 9 and 10 of the Transcriptions and Other Records of Proceedings at the NBCCI.

second respondent. There, thus, exists not cause whatsoever to make such an extra ordinary order as to costs against an institution rendering valuable services to the public such as the first respondent and its panellist.

- [29] I am, however, satisfied from the papers and oral submissions that fairness cries out for a costs order against the third respondent although it effectively did not oppose the matter. In this regard it shall be recalled that the third respondent filed opposing papers out of time and its condonation application was dismissed with costs. The applicant read and dealt with those opposing papers before it could oppose the condonation application successfully. It is, therefore, entitled to its costs relative to such opposing papers.
- [30] As to security in terms of section 145(7) read with section 145(8) of the LRA I can only point out that such security clearly serves to suspend the operation of the impugned award pending the outcome of the review process. At this stage of the proceedings and in the light of the view I have taken of the matter it is not necessary, for practical purposes, to determine such a question in the circumstances of the instant matter.
- [31] In conclusion, the applicant prays for the setting aside and the substitution of the impugned arbitration award. The applicant's gripe in this regard relates to the non- existence of the demotion position. The issue as to the existence or otherwise of such a position did not feature before the second respondent and there is, as such, nothing on record to assist in this regard. The award of demotion is competent in appropriate circumstances according to section 193 of the LRA. I am, as such, not able to accede to the applicant's request for replacement of the award at this stage because the question as to the non-existence of such a position is only raised on review by the applicant. I do not have the third respondent's version on the issue before me. The issue needs to be ventilated properly. The appropriate course in the circumstances is to remit the matter to the first respondent for arbitration *de novo* before another arbitrating panellist.

Order

- [32] In the circumstances, I make the following order:

1. The second respondent's arbitration award dated 17 March 2017 under case number GPCHEM30 -16/17 is reviewed and set aside.
2. The dispute between the parties is remitted to the first respondent for arbitration afresh before a panellist other than the second respondent.
3. The third respondent shall pay the applicant's costs.

LJ Lekale

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Ms ME Duvenage (Duvenage Attorneys)

For the Respondent: No appearance

LABOUR COURT