



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2079/13 & J2426/13

In the matter between:

XHARIEP DISTRICT MUNICIPALITY

Applicant

and

SAMWU OBO LEHLOHONOLO MOSES MAY

First Respondent

SURIA VAN WYK N.O

Second Respondent

SALGBC

Third Respondent

Heard: 20 February 2018

Delivered: 23 February 2018

Summary: An opposed application to review and set aside the arbitration award. The award issued by the second respondent falls within the bounds of reasonableness. There is no justifiable basis upon which this court can upset the award made by the second respondent. Held: (1) The application for review is dismissed. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an opposed application seeking to review and set aside an arbitration award issued by the second respondent under the auspices of the third respondent. The second respondent found that the dismissal of Mr Lehlohonolo Moses May was both procedurally and substantively unfair. She ordered the applicant to reinstate May with retrospective effect and to pay him back pay. She made no order as to costs. The applicant is now aggrieved and seeks a relief.

Background facts

- [2] Lehlohonolo Moses May was employed by the applicant effective 1 March 2002. At the time of his dismissal he held a position of a Communications Officer. Around May 2012, he was arraigned to face the following charges:

Charge 1: You are allegedly guilty of misconduct in terms of the Disciplinary Procedures and Code Collective Agreement in that on 15 May you fraudulently entered your arrival time to be 7h30 when the actual arrival time was 7h45. This despite you knowing that this constitutes misrepresentation.

Charge 2: You are allegedly guilty of misconduct in terms of the Disciplinary Procedures and Code Collective Agreement in that from 16 May 2012 until 17 May 2012, you continued to enter the arrival time that gave the impression that you arrived earlier than the actual arrival. This despite a reprimand from the Acting Municipal Manager, M M Kubeka.

Charge 3: You are allegedly guilty of misconduct in terms of the Disciplinary Procedures and Code Collective Agreement in that for the month of January 2012, you deliberately did no sign the attendance

register in order to register your work attendance. This despite the fact that this constitutes an audit query. [My underlining and emphasis]

- [3] He was found guilty and dismissed on 6 November 2012. He was aggrieved by his dismissal. With the assistance of his Union, SAMWU a dispute of alleged unfair dismissal was referred. Subsequently the second respondent published the award under attack.

Grounds of Review

- [4] The applicant raised a number of grounds, in its papers. In the light of the crystalized test for review it is unnecessary to repeat all of them in this judgment. Suffice to mention that it is apparent that the applicant is seeking to appeal as opposed to reviewing.

Argument

- [5] In its founding papers, the applicant flashed out the following grounds for review:

- 5.1 The commissioner committed misconduct in relation to her duties, due to the fact that she did not duly and properly apply her mind-
Failure to apply mind.
- 5.2 Her failure to apply mind led her to a legally incorrect and unreasonably unfair award.
- 5.3 She allegedly *ignored evidence.*
- 5.4 She committed an error of law by applying the double jeopardy rule-
Error of law.

- [6] The bulk of the founding affidavit is replete with what appears to be grounds of appeal as opposed to review. The supplementary affidavit did not introduce further grounds of review as it is usually done, but sought to support a prayer for condonation for the late filing of the review application. Accordingly, the applicant effectively raised three recognizable grounds of review, namely, failure to apply mind, ignorance

of evidence and error of law. Therefore this review shall be considered on the strength of those grounds and one of reasonable outcome.

Evaluation

- [7] Failure to apply mind simply entails ignoring relevant evidence and considering irrelevant evidence and or factors. It is unclear from the applicant's papers which irrelevant factors were taken into account. On the contrary, the second respondent rendered a long award wherein she almost verbatim recorded the evidence of all the witnesses that appeared before her. This ground of review is not supported by any irrelevant factors allegedly taken into account by the second respondent. The ground is bound to fail.
- [8] With regard to ignoring evidence, it must be restated that the fact that the evidence is not mentioned in an award does not suggest that it was ignored. Commissioners are enjoined to give brief reasons in terms of the LRA. However on the applicant's own version all the evidence highlighted by it arise from the paragraphs in the award so rendered. This in itself is an indication that such evidence was considered by the second respondent. Considering how the second respondent approached the evidence before her, I am unable to agree that she ignored any evidence.
- [9] With regard to the error of law, it must again be restated that not all errors of law vitiates an award. It is only a material error of law which affects the outcome that vitiates an award. According to the applicant, the error of law is confined to the application of the principle of double jeopardy. The principle simply entails being punished twice for the same offence. The principle is an acceptable one in our labour law. The second respondent applied the principle to charge 1, in that May was warned for the conduct already. Such finding is consistent with the principle of double jeopardy. Accordingly a finding of procedural unfairness applying this principle cannot be faulted. This ground is bound to fail as well.

- [10] Turning to reasonableness test. The findings by the second applicant that there was no evidence to support charges 2 and 3 cannot be faulted. They both fall within the bounds of reasonableness and most of all are consistent with the evidence presented before her. With regard to the harshness of the sanction for charge 1, the second respondent interfered with the sanction of the employer with reasons that demonstrate that the dismissal as a sanction was unfair. In *Quest Flexible Staffing Solutions (Pty) Ltd v Abram Legoabe*¹, the LAC clarified the issue thus:

In *Sidumo*, the Constitutional Court held that a Commissioner is not empowered to establish afresh what the appropriate sanction is, but rather to decide whether the employer's decision to dismiss is fair. In making this determination, the commissioner should not defer to the decision of the employer but should weigh up all the relevant factors, including the importance of the rule that has been breached, the reason the employer imposed the sanction of dismissal, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of the dismissal on the employee, and the employee's service record. These factors are, however not considered by the Constitutional Court to be an exhaustive list. Hence other relevant factors that may warrant consideration in assessing the fairness of a sanction include the seriousness of the misconduct, the effect of such conduct on the continuation of the employment relationship, the nature of the job and the circumstances of the infringement...In addition, the appellant regarded seriously disrespectful conduct, of the nature committed by the respondent, as an offence that warranted dismissal on the first occasion. Its code of conduct provides as much. In failing or refusing to demonstrate any acceptance of wrongdoing or remorse, the respondent rendered the continued employment relationship with the appellant intolerable and undermined the applicability of corrective or progressive discipline. [My underlining and emphasis]

- [11] Accordingly, I am satisfied that the second respondent was entitled to interfere with the sanction of dismissal as it was harsh and unfair in the

¹ Case Number JA 104/13 delivered on 21 October 2014.

circumstances. In the light of the above stated, I am of a firm view that the award falls within the bounds of reasonableness and cannot be interfered with on review.

- [12] There is also an unopposed rule 11 application seeking to dismiss the review on the grounds of delay. This application is overtaken by events. On this day, I heard the review. Since, I am minded to dismiss the review on its merits, it becomes unnecessary to give this application any consideration. I will simply dismiss it as it was not withdrawn despite the court drawing to the attention of counsel that the review is being heard. Allied to this is a condonation application. The application was four weeks out of time. Although the explanation is scant, I would not entertain the application because it lacked reasonable prospects of success. It too would simply be dismissed.
- [13] Together with the review application and its interlocutory applications was a self-standing section 158(1) (c) application. Since I am to dismiss the review application, there is no reason in law why the award should not be made an order of this court.
- [14] As to costs, in line with the recent Constitutional Court decision², costs shall not follow the results. There are no reasons why the applicant should be mulcted with costs.

Conclusions

- [15] As a court of review I must always remind myself that I cannot substitute the findings of an arbitrator simply because I would have come to a different finding. If an award is one that a reasonable commissioner can arrive at, I cannot substitute it. I am unable to fault the second respondent's findings.

Order

- [16] In the results, I make the following order:

² Sibongile Zungu v Premier of the Province of Kwazulu Natal and others [2018] ZACC 1

1. The application to dismiss is hereby dismissed.
2. The condonation application is hereby dismissed.
3. The review application is hereby dismissed.
4. The award of the second respondent under case number FSD011307 issued on 26 July 2013, is hereby made an order of this court.
5. There is no order as to costs.

Moshoana, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate P Venter.

Instructed by: Mthembu & Mohamed Attorneys, Bloemfontein.

For the First Respondent: Advocate J Eastes.

Instructed by: Maenetja Attorneys, Pretoria.