



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 695/13

In the matter between:

THABISO K BAPELA

Applicant

And

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL**

First Respondent

COMMISSIONER: PRINCE KEKANA

Second Respondent

DEPARTMENT OF HEALTH - GAUTENG

Third Respondent

Heard: 08 December 2017

Delivered: 02 March 2018

Summary: Review application – dishonesty is a serious offence that warrants dismissal.

JUDGMENT

Nkutha- Nkontwana J

Introduction

- [1] The applicant, Mr Thabiso Bapela (Mr Bapela) seeks an order reviewing the arbitration award issued by the second respondent, Mr Prince Kekana (the arbitrator) dated 10 December 2012 under case number PSHS 320 -11/12. The third respondent, the Department of Health: Gauteng (DOH) is opposing the application.
- [2] Mr Bapela's main ground of review is that the arbitrator failed to apply his mind to the material facts before him in relation to the misconducts and the sanction; as such, came to an unreasonable outcome.

Background

- [3] Mr Bapela was employed on 1 August 1997 and at the time of his dismissal he was occupying a position of a Labour Relations Officer at Chris Hani Baragwanath Hospital (Bara). He was charged and found guilty of the following transgressions:
- 3.1. Dishonesty in that he acted as a Commissioner of Oaths in relation to Mr Mbane's appeal letter which he had authored consequent to the termination of his services for abscondment between March and September 2008.
 - 3.2. Conflict of interest in that he acted as Mr Mbane's representative when he was appealing the decision to terminate his services due to abscondment between March and September 2008.
 - 3.3. Bribery or conflict of interest in that he demanded a payment of an amount of R5000.00 from Mr Mbane for assisting him to be reinstated.
 - 3.4. Improper, disgraceful and unacceptable conduct in that he entered into his office through a window on one Sunday night.
- [4] Mr Mbane was a cleaner at Bara and had absconded from work between March and September 2008. Mr Bapela, as the Labour Relations Officer, wrote him letters informing him that he had been absent without authority and the consequences thereof. Mr Mbane's employment contract was

ultimately terminated in terms of section 17(5) of the Public Service Act¹ (the PSA).

- [5] Mr Bapela handled Mr Mbane's appeal. He wrote the letter of appeal and acted as the Commissioner of Oaths to commission same. It was his evidence that he had assisted Mr Mbane by writing his letter of appeal because he (Mr Mbane) could not write in English. Mr Mbane had brought a letter written in isiZulu and he translated it to English and stamped the letter with the Commissioner of Oaths stamp.
- [6] Mr Bapela conceded under cross examination that he was not a Commissioner of Oaths as his position was at level 6 whilst only employees in level 8 and above were designated as Commissioners of Oaths. However, everyone in the Human Resources Department had been using the Commissioner of Oaths stamp irrespective of their levels, so he further testified. He was adamant that it was his duty to assist employees with translation of letters even though he failed to produce the copy of the letter Mr Mbane had written in isiZulu.
- [7] Mr Bapela went further to write the covering letter for Mr Mbane's appeal papers wherein he informed the Appeal Committee that the DOH had intended to withdraw the charges against Mr Mbane. Mr Gerald Papo (Mr Papo), the Head of Labour Relations and Mr Bapela's supervisor, testified that Mr Bapela did not have authority to write the letter to the Appeal Committee on behalf of the CEO of Bara, purporting to withdraw the charge against Mr Mbane. As a result of Mr Bapela's letter to the Appeal committee, Mr Mbane was reinstated with immediate effect. Mr Bapela testified that he wrote the withdrawal letter because the employer had failed to produce the HRD100 form and that, in any event, the Appeal Committee failed in its duties as they ought to have rejected his letter.
- [8] Mr Papo testified that Mr Bapela's misconduct was brought to his attention by Mr Mbane. He had lodged a complaint against Mr Bapela, alleging that he asked for a monthly deposit bribe amounting to R5000.00 into his bank account. Mr Bapela denied that he had ever solicited a bribe from Mr Mbane.
- [9] It is common cause that Mr Bapela had entered his office through a window on Sunday, 11 January 2009, at 22h00. His defence was that he had no key to his office and urgently needed his medication which he has left in his office. He conceded under cross examination that he did not inform the security guards that he was there to fetch his medication. He also had no explanation for waiting till late at night to fetch his medication. When asked

¹ Act 103 of 1994 as amended.

by the Court as to why he did not go to the casualty section at Bara for medical attention, his response was that Bara does not supply the type of medication he is using.

- [10] The arbitrator found Mr Bapela guilty in respect of the first, second and fourth charges and not guilty in respect of the third charge of bribery. Mr Bapela also challenged the fairness of the procedure without success.

Review test

- [11] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*,² the Labour Appeal Court (the LAC) as per Waglay JP contextualised the review test as postulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ and stated that:

'[14] *Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.'

- [12] In *Head of the Department of Education v Mofokeng*,⁴ the LAC, endorsing the above judgment, stated that:

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, ... this court in *Gold Fields* ... held that before such an irregularity

² [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 14.

³ (2007) 28 ILJ 2405 (CC).

⁴ *Mofokeng* [2015] 1 BLLR 50 (LAC) at paras 30 to 33; see also *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in the setting aside of the award. It must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome...

[31] ... Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] ... 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 inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result ...

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order.'

Evaluation

[13] On the fairness of the procedure. The arbitrator accepted the objective facts that Mr Bapela had been duly notified of the disciplinary enquiry on two occasions but failed to attend. The disciplinary enquiry proceeded in his absence and found him guilty in respect of all charges. Mr Bapela failed to proffer a plausible explanation for his failure to attend the disciplinary enquiry. He also failed to submit proof that he had requested a postponement and was granted as alleged. In my view, the arbitrator's conclusion in this regard cannot be faulted.

[14] Turning to the substantive fairness, the crux of Mr Bapela's case is that his mitigation circumstances were never taken into account when the arbitrator determined the sanction of dismissal. Yet, he was found guilty of dishonesty and conflict of interest which are both serious misconducts.

- [15] Regulation 7(1) of the Regulations Governing the Administering of an Oath or Affirmation,⁵ issued in terms of the Justices of the Peace and Commissioners of Oaths Act,⁶ a Commissioner of Oaths shall not administer an oath or affirmation relating to a matter in which he has an interest. Also, the *ex-officio* Commissioner of Oaths must state the rank and his designation in line with the Regulations. In this instance, Mr Bapela was not a Commissioner of Oaths *de jure*. Even if he was, *de facto*, he could not have authored a document and by the same token commission it as a Commissioner of Oaths when he clearly had an interest in the matter.
- [16] Things got even worse for Mr Bapela as he failed to protect the interest his employer, the DOH. His misrepresentation of facts to the Appeal Committee was evidently meant to benefit Mr Mbane at the expense of the DOH. In the end, Mr Mbane was reinstated on the basis of the said distortion.
- [17] Both these transgressions have an element of dishonesty which goes to the core of the employment relationship, which is trust. In *Impala Platinum Ltd v Jansen and others*,⁷ dealing with the issue of appropriateness of sanction of dismissal in instances where the transgression is serious, the LAC, per Judge President Waglay, stated the following:

[19] As held in *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and others*,⁸ an "employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer."⁹ The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely.¹⁰ Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is "a sensible operational response to risk management".¹¹ In a recent and as yet to be reported judgment of *Schwartz v Sasol Polymers and others*,¹² this Court dealt with the case of an employee found guilty of conflict of interest in that his wife had received gifts from several of his employer's service providers. Unlike in this matter, the commissioner there found the employee's dismissal to be

⁵ Published under GN R1258 in GG3619 of 21 July 1972, as amended

⁶ Act 16 of 1963, as amended.

⁷ [2017] 4 BLLR 325 (LAC) at paras 19 to 20.

⁸ Case number CA 2/15 delivered on 25 November 2016.

⁹ At para [26] and see also *Sappi Novoboord (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) at para [7] [also reported at [1998] 5 BLLR 460 (LAC) – Ed]; *CSIR v Fijen* [1996] 6 BLLR 685 (AD) 691; *Murray v Minister of Defence* [2008] 3 All SA 66 (SCA); [2008] 6 BLLR 513 (SCA); 2009 (3) SA 130 (SCA); 2008 (11) BCLR 1175 (SCA); (2008) 29 ILJ 1369 (SCA) at para [6].

¹⁰ *Miyambo v CCMA and others* [2010] 10 BLLR 1017 (LAC); (2010) 31 ILJ 2031 (LAC) at para [16]; *Toyota SA (Pty) Ltd v Radebe* supra; and *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry* [2008] 3 BLLR 241 (LC) at para [42].

¹¹ *De Beers Consolidated Mines Ltd v CCMA and others* [2000] 9 BLLR 995 (LAC) at para [22].

¹² Case number JA46/2014 delivered on 5 October 2015.

substantively unfair. In setting aside the award, this Court (upholding the Labour Court judgment on substantive fairness) held that the dishonest nature of the employee's misconduct was of such a nature as to make continued employment intolerable. It further held that it would be fundamentally unfair and unjust to expect an employer to retain in its workplace a senior employee who has shown himself to be guilty of dishonesty.¹³ The court also took the view that if the employee was remorseful, the nature of the dishonesty was such that these mitigating factors could not help in mitigating the harsh sanction of dismissal. In this respect, the court held that:

"While I agree . . . that the lack of remorse shown by appellant is relevant, even if genuine remorse had been shown by him, this would only have been a factor to be considered in his favour in determining sanction and would not have barred his dismissal, remorseful or not, having regard to the seriousness of the misconduct committed."¹⁴

[20] The commissioner rightly found that Jansen's conduct went to the root of the employment relationship deserving of the severest sanction. This cannot be faulted. In fact, it would be unfair to expect the appellant to retain Jansen in its employ where Jansen had not only displayed gross misconduct in failing to comply with statutory regulations but also contravened the duty to act in good faith by promoting his wife's business to appellant's service providers thereby compromising fairness and honesty within the appellant's business relationships. In the circumstances, there was no need to lead any evidence of a breakdown in the relationship, as it was obviously the case. This ground of appeal thus succeeds.' (Footnotes integrated)

[18] Similarly, in the present case, even if Mr Bapela was remorseful, the nature of the misconduct is such that his mitigating factors could not help in mitigating the harsh sanction of dismissal. The arbitrator correctly took into account the fact that Mr Bapela was a Labour Relations Officer, custodian of discipline, and as such he ought to have set a good example of discipline.

[19] On the last charge, I deem it unnecessary to deal with it in the light of the conclusion I have come to above; save to state that I find it very strange that Mr Bapela found it proper to break into his office through a window at night in order to get his medication despite Bara being a health care facility that offers 24-hour casualty or emergency services.

¹³ At para [30].

¹⁴ At para [24].

[20] Lastly, Mr Bapela's failure to prosecute the review application timeously is accordingly condoned.

Conclusion

[21] In all the circumstances, the arbitrator's findings cannot be faulted and as such the application stands to be dismissed.

[22] It is just and equitable that costs should not follow the result since Mr Bapela is an individual litigant who conducted his own case.

[23] In the premises, I make the following order:

[24] Order

1. The review application is dismissed with no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr T Bapela, unrepresented

For the respondent: Advocate Thilivhali Kwindi

Instructed by: Mncedisi Ndlovu Sedumedi Attorneys

LABOUR COURT