



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2193/15

In the matter between:

SEITEALENG LULU VALTYN

Applicant

and

DEPARTMENT OF EDUCATION

NORTH WEST

First Respondent

EDUCATION LABOUR RELATIONS

COUNCIL (ELRC)

Second Respondent

COMMISSIONER THABE PHALANE N.O

Third Respondent

Heard: 18 October 2017

Delivered: 29 March 2018

Summary: When the applicant has not established that errors committed by an arbitrator led him to reach an unreasonable result, the award issued by the arbitrator falls within bounds of reasonableness and may not be reviewed and set aside.

JUDGMENT

LALLIE, J

- [1] The applicant is employed by the first respondent (the Department) at Delareyville. Her husband, Mr Valtyn (Valtyn), is also an employee of the Department. He is a senior official at the district office of the Dr Mompoti Region in Vryburg which is about 80 kilometres from Delareyville. In March 2015, the applicant received information that the applicant had assaulted Ms Tshesejane (Tshesejane), a junior official, in Valtyn's office. Tshesejane works with Valtyn. On 10 March 2015, the applicant received a notice of the Department's intention to put her under precautionary suspension. On 16 March 2015, the applicant was placed under precautionary suspension pending the finalisation of an investigation and/or disciplinary enquiry that would be instituted against her. The disciplinary enquiry was never instituted instead the applicant's suspension was lifted. She then referred an unfair labour practice dispute relating to her suspension to the second respondent (the ELRC). The dispute was arbitrated by the third respondent (the arbitrator) who issued an award in which he found the applicant's suspension procedurally and substantively fair. The applicant unsuccessfully sought an order rescinding the award on the basis that the arbitrator had failed to consider heads of argument filed on her behalf before deciding the dispute before him. In this application the applicant seeks an order reviewing and setting aside the arbitration award, alternatively, reviewing and setting aside the rescission ruling. The application is opposed by the Department.
- [2] No evidence was led at arbitration. The applicant was represented by an attorney who submitted a bundle of documents and presented argument. The parties agreed to further file heads of argument before 25 September 2015. In the award, the arbitrator recorded that he did not receive the applicant's heads of argument and received the Department's heads of argument on 29 September 2015. The arbitrator considered the submission before him, provisions of section 20 of the Employment of Educators Act¹ (the Act) which regulates the suspension of educators as well as provisions of the Labour Relations Act² (the LRA). He found no facts suggesting that the Department violated provisions of the Act. The arbitrator noted the applicant's

¹ Act 76 of 1998.

² Act 66 of 1996.

acknowledgement that there were three people in the room or the vicinity of the alleged incident namely the applicant, her husband and the victim. He found that the victim was the potential source of the information about the allegations of assault. The Department got information about the allegations and acted on it. It gave the applicant notice and informed her of the allegations that led to the issuing of the notice. For those reasons, the arbitrator found the suspension procedurally fair. The ruling that the suspension was also substantively fair is based on the senior position the applicant's husband holds and that he was a potential witness. The arbitrator expressed the view that as the applicant and Valtyn were husband and wife, requesting the applicant to be suspended from the work place was more reasonable. He found that the applicant's presence at Vryburg would make potential witnesses, the victim in particular, uncomfortable.

- [3] The applicant submitted that the arbitrator committed a gross irregularity in the conduct of the arbitration in not considering heads of argument filed on her behalf by the agreed date, before making his decision. A further ground the applicant sought to rely on is based on the arbitrator's failure to consider important documents filed by the applicant. The documents include a letter by the Deputy Director General clearing the applicant of any wrong-doing and a statement by Tshesejane in which she stated as follows:

"I Basheera Tshesejane has never lodged any complain/grievance about any matter. I am therefore surprised that everybody is trying to give me advice to the contrary.

My relationship with Mr G.P Valtyn is sound and I still want to work in his office as to develop myself personally and professionally. I've never requested any assistance from any union or any individual in any matter.

Furthermore, I was never assaulted and did not lodge any complaint with any union or with the Department."

The applicant also submitted that she worked 84 kilometres from Tshesejane workplace, there was therefore no need to remove her from her workstation. The

applicant sought an alternative order to have the rescission ruling reviewed and set aside on the grounds that the arbitrator unreasonably refused to consider her heads of argument which had been filed within the agreed period.

- [4] The Department opposed the application on the grounds that it was an appeal disguised as a review. It denied that the arbitrator committed irregularities in the manner in which he conducted the arbitration or by the decision he reached. The rescission ruling, in the first respondent's view, cannot be faulted because oral submissions were made at arbitration on behalf of the applicant. The applicant further failed to prove that the arbitrator's failure to consider the heads of argument prejudiced her. The first respondent's case was that the award and rescission ruling are correct and reasonable.
- [5] The test for review is reasonableness. For an arbitration award to pass muster it must fall within bounds of reasonableness. The applicant submitted that the award is unreasonable as a result of errors made by the arbitrator in the conduct of the arbitration. The test to determine whether the arbitrator committed errors which rendered his award reviewable is expressed as follows in *Head of the Department of Education v Mofokeng and others*³:

"[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 enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.'

"[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling

³ [2015] 1 BLLR 50 (LAC) para 33:

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.”

- [6] The totality of the evidentiary material before the arbitrator has to be taken into account in determining the reasonableness of an award. The arbitrator erred in not taking the applicant's heads of argument into account when making his decision because they were filed within the agreed period. The error is not material because the record reflects that the applicant's attorney presented oral argument at arbitration which the applicant has not accused the arbitrator of not taking into account. In addition, the applicant did not prove that she suffered prejudice as a result of the omission. She also did not prove that the omission led the arbitrator to reach an unreasonable decision.
- [7] An assessment of the evidentiary material which served before the arbitrator does not support the applicant's submissions that the arbitrator erred in finding her suspension fair. The applicant submitted that the arbitrator erred in not finding that there was no need to suspend her based on the Deputy Director General's letter and Tshesejane's statement. Contrary to the applicant's submissions, the arbitrator considered that on the applicant's version there were three people in the office when the alleged assault took place and the Department got to know of it. The arbitrator cannot be faulted for finding that there was a need to suspend the applicant when the Department got to know of the allegation that she assaulted a junior employee in the office of her husband who was the most senior official in the district. The finding is consistent with the Department's obligation to ensure a safe working environment for its employees. The commissioner's decision that the Department could make its own fact finding in her absence is reasonable.
- [8] The applicant's argument that the arbitrator failed to consider the distance between Delareyville and Vryburg has no merit because the arbitrator based his decision on the definition of the workplace presented on behalf of the Department. His decision is therefore based on the material before him. The arbitrator had, in term of section 138 (7) of the LRA, to give brief reasons for his decision. He identified the enquiry he had to conduct correctly, conducted

it in the correct manner and reached a reasonable decision. His award falls within bounds of reasonableness.

[9] The rescission ruling can, similarly, not be faulted as the record supports the arbitrator's decision that the award was not made in the applicant's absence.

[10] In the premises, the following order is made:

Order

- 1 The application to review the arbitration award is dismissed.
- 2 The application to review the rescission ruling is dismissed.

Z Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Wissing of Henk Wissing Inc.

For the Third Respondent: Advocate Murangwa

Instructed by: Kgomo Attorneys Inc.

LABOUR COURT