



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 751 /2015

In the matter between:

RATLOU
Applicant

LOCAL

MUNICIPALITY

and

SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL (SALGBC)

First Respondent

S MODIBA N.O

Second Respondent

SAMWU obo PAPIE CHASE

Third Respondent

Heard: 25 April 2018

Delivered: 20 June 2018

Summary: Review application. Arbitrator's findings that dismissal was unfair is not to be interfered with on review.

JUDGMENT

PRINSLOO, J

Introduction

- [1] There are two applications before me. The first is a review application (JR 751/15) wherein the Applicant seeks to review and set aside an arbitration award issued on 23 March 2015 under case number NWD111403 where the Second Respondent (the arbitrator) found Mr Chase's (the employee) dismissal substantively and procedurally unfair and ordered his reinstatement.
- [2] The second is an application (J1075/15) in terms of the provisions of section 158(1)(c) of the Labour Relations Act¹ (LRA) wherein the Third Respondent seeks an order to make the same arbitration award an order of Court.

Background facts

- [3] The employee commenced employment with the Applicant in May 2012 as a skills development facilitator. The employee was dismissed on 8 September 2014, following a termination letter after he was 'absent from duty without permission for a period of 17 days and failed to give acceptable reasons for such absence.'
- [4] The Third Respondent subsequently referred an unfair dismissal dispute to the First Respondent and the matter was arbitrated on 16 March 2015.

The evidence adduced:

- [5] The issue to be decided by the arbitrator was whether the employee's dismissal was substantively and procedurally fair.
- [6] In order to assess the arbitrator's findings in respect of substantive and procedural fairness and the award he issued, it is necessary to consider the reason the employee was dismissed for, namely abscondment, and the evidence adduced at the arbitration proceedings.
- [7] The Applicant's first witness, Mr Seleke, is the manager in the office of the mayor and he testified that on 2 September 2014 there was an illegal march and he saw the employee at the taxi rank, being part of the group of community members protesting against the municipality. Mr Seleke was unable to testify as to the number of days the employee was absent from work and he confirmed that he only saw the employee on this one occasion. Mr

¹ Act 66 of 1995, as amended.

Seleke was unable to say whether the employee reported for work on the said day and he had no knowledge of whether the employee absconded or not.

- [8] Mr Mbana, the Applicant's human resources manager, testified that the employee reported to him. He testified about the letter dated 8 September 2014, addressed to the employee, which letter is a notice of termination of service due to abscondment from duty. The letter informed the employee that his employment contract was terminated with immediate effect due to the fact that he had been absent from work without permission for a period of 17 days and he failed to give acceptable reasons for such absence.
- [9] Mr Mbana testified that the employee was dismissed because he was absent from work for 17 days. Mr Mbana tried to call the employee twice, but his mobile phone was off. He also went to the employee's place of residence in Madibogo, but he could not find him there. When the employee returned to work, he was asked about his whereabouts and the employee indicated that he was not well and he submitted a medical certificate. During his absence, the employee did not report that he was sick, but only reported that upon his return to work.
- [10] Mr Mbana explained that in terms of the Applicant's leave policy the employee has to report before 10:00 that he was not coming to work and when he returned to work, he had to submit a medical certificate. The employee failed to report his absence in accordance with the said leave policy.
- [11] In cross-examination Mr Mbana confirmed that the employee was dismissed because he did not report that he would not come to work and because he was absent from duty for 17 days. He only reported when he returned to work and the Applicant was unaware of his whereabouts.
- [12] Mr Mbana confirmed that the days the employee was absent from work were from 12 – 15 August 2014, 18 August 2014, 21 and 22 August 2014, 25 to 29 August 2014 and 1 to 5 September 2014, which is a total of 17 days.
- [13] The employee submitted a medical certificate for the period 26 – 28 August 2014 and the Applicant did not take issue with the medical certificate *per se*, but insisted that the problem was that the employee did not inform the Applicant that he would be unable to report for duty on those dates.

- [14] The employee also submitted a medical certificate indicating that he was not fit for duty from 2 – 5 September 2014. Mr Mbana conceded that it was not correct to say that the employee was absent without a valid reason for this period, as he was booked off sick. He conceded that for seven of the 17 days the employee was declared medically unfit for work.
- [15] Mr Mbana agreed that as at September 2014 the employee had 35 days'vacation leave and 54 days sick leave available. As to why the Applicant did not deduct the 17 days that the employee was absent from work from his available leave credits, Mr Mbana explained that it was not deducted because the employee has a tendency of not coming to work and that is why the Applicant decided to dismiss him.
- [16] Mr Mbana conceded that no letter was issued to the employee, as provided for in the disciplinary code, to establish his whereabouts and to inform him of his abscondment. The disciplinary code also provides that if an employee reports for duty, he should be afforded an opportunity to make representations prior to a decision to terminate his services. The employee was dismissed on the same day he reported for duty.
- [17] It is evident from Mr Mbana's evidence that his understanding is that the employee has absconded because he did not report for duty on certain dates.
- [18] The Applicant's last witness, Mr Ntutane, testified that he is employed as a waste removal officer and he saw the employee on 2 September 2014 participating in a protest.
- [19] The employee testified and referred to the termination letter wherein it is alleged that he was absent from work from 12 – 15 August 2014, 18 August 2014, 21 and 22 August 2014, 25 to 29 August 2014 and 1 to 5 September 2014. The employee testified that he was at work from 12 – 25 August 2014, he was on sick leave from 26 – 29 August 2014, he was at work on 1 September 2014 and from 2 - 5 September 2014, he was on sick leave.
- [20] The employee denied that he absconded for a period of 17 days. He further denied that he was given an opportunity to make representations prior to his dismissal.

- [21] In cross-examination the authenticity of the employee's medical certificates was challenged and it was disputed that he was at work on the dates as per his evidence. The employee was able to recall specific events that happened at work on the dates he claimed to be at work.

The arbitrator's findings

- [22] In his analysis of the evidence, the arbitrator considered the fact that the employee was dismissed following a termination letter dated 8 September 2014. The procedure provided for in the disciplinary code was not followed and no hearing was held. The employee was not afforded an opportunity to explain his absence prior to his dismissal and had he been afforded the opportunity, he would not have been dismissed. The arbitrator found the employee's dismissal to be procedurally unfair.
- [23] In respect of substantive fairness, the arbitrator recorded that the employee was dismissed because he absconded. Clause 10.1 of the disciplinary code provides that 'in the event that the employee has absconded himself for a period of more than ten (10) days without notification to the employer, such an employee shall be deemed to have absconded from duty.' The arbitrator accepted the employee's version and account for the days the Applicant alleged that he absconded, but when he was in fact either at work or on sick leave and found that the employee did not stay away from work for more than 10 days, therefore there can be no abscondment.
- [24] The arbitrator observed that in a case of abscondment the employer has to show that the employee who is absent from work, has no intention to return to work, which was not the case *in casu* where the Applicant rather charged the employee for not being present at work on specific dates.
- [25] The arbitrator concluded that the Applicant was unable to prove abscondment and it had no valid reason to dismiss the employee. The employee was reinstated retrospectively.

The grounds for review

- [26] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable or

not. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

- [27] The Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*³ affirmed the test to be applied in review proceedings and held that:

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

- [28] The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach of dealing with the award is improper as the reviewing Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make⁴.
- [29] It is trite that an applicant's case should be made out in the founding affidavit. In a review application the applicant can file a supplementary affidavit to supplement the grounds for review introduced in the founding affidavit.
- [30] In the founding affidavit the Applicant raised the following grounds for review: the arbitrator committed misconduct by failing to take into consideration the whole of the evidence the Applicant presented to him, the arbitrator misconstrued the Applicant's case by concluding that the Applicant should have charged the employee with absenteeism and not dismiss him with desertion and that the arbitrator committed misconduct by concluding that the employee was dismissed without allowing him an opportunity to appeal.

² 2007 28 ILJ 2405 (CC) at para 110.

³ (2014) 35 ILJ 943 (LAC).

⁴ (2014) 35 ILJ 943 (LAC) at paras 18 and 19.

- [31] Mr Eastes for the Third Respondent argued that no case is made out for review in the Applicant's founding affidavit and therefore the Applicant cannot succeed with this review application.
- [32] An analysis of the grounds for review raised in the founding affidavit shows that the grounds for review were not properly considered and drafted with due consideration of the arbitration award and that the applicable test was not considered at all, alternatively it indicates that the arbitration award and the arbitrator's findings were not understood.
- [33] The Applicant accuses the arbitrator of committing misconduct by failing to take into consideration the whole of the evidence the Applicant presented to him, without any substantiation of what evidence presented was not taken into consideration. The allegation is vague, unsubstantiated and without merit.
- [34] The Applicant's allegations that the arbitrator misconstrued the case by concluding that the Applicant should have charged the employee with absenteeism and not dismiss him for desertion and that the arbitrator concluded that the employee was dismissed without allowing him an opportunity to appeal, show that the award was not properly understood as those were not findings made by the arbitrator.
- [35] In *Northam Platinum Ltd v Fganyago NO and others*⁵ it was held that:
- 'In my view, the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit.
- [36] In the founding affidavit and the grounds for review raised therein, the Applicant failed to make allegations to sustain its application. There is not a single challenge to the reasonableness of the arbitrator's findings or the outcome of the arbitration proceedings.
- [37] The Applicant filed a supplementary affidavit and supplemented its grounds for review. Firstly by stating that the award is reviewable as it does not contain

⁵ (2010) 31 ILJ 713 (LC) at para 27.

any reasons why the employee's dismissal was substantively unfair. This ground for review is without merit as the arbitrator dealt with the issue of substantive fairness in paragraphs 37 – 43 of the arbitration award and the reason why the employee's dismissal was substantively unfair, is recorded. This ground for review is yet another vague and unsubstantiated ground for review.

[38] Secondly, it is trite that dishonesty justifies summary dismissal. *In casu* it was sufficiently proven that the employee was dishonest and that he was a serial absconder who abused his right to sick leave, wherefore summary dismissal was justified. The arbitrator ought to have found that the employee, claiming to be sick but able to attend a service delivery protest on 2 September 2014, was not sick but used illness as an excuse to be absent from work.

[39] There are a number of difficulties with this ground for review, all indicative of the Applicant's lack of understanding of a review process before this Court.

[40] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others*⁶ the Labour Appeal Court held that:

‘It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal’.

[41] The Applicant did not charge or dismiss the employee for dishonesty or abuse of sick leave, nor was any such evidence presented or such version put to the employee in cross-examination during the arbitration proceedings. The arbitrator had to determine whether the employee's dismissal due to abscondment was fair. To expect the arbitrator to find that the employee abused his sick leave, supports the arbitrator's finding that the case was not one of abscondment, but rather one of being absent without authorisation.

[42] The Applicant presented no case in respect of dishonesty or that the employee was a ‘serial absconder’ who abused his sick leave. In any event, in the case of abscondment, the employee must have an intention not to return to work, which is different from an employee abusing sick leave.

⁶ (2008) 29 ILJ 964 (LAC).

- [43] The arbitrator cannot be faulted for findings he did not make on issues he was not required to decide or on evidence that was not placed before him.
- [44] There is no merit in the grounds for review raised in the supplementary affidavit.
- [45] If the Applicant experienced attendance or leave abuse issues with the employee, it is within the employer's prerogative to address those issues, on the proviso that it does so in compliance with its policies and procedures. In this instance however, the issue was clearly not one of abscondment.
- [46] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him. I have considered this question after perusal of the transcribed record, the arbitration award and the grounds for review raised by the Applicant. In my view the arbitrator's findings are reasonable based on the evidence that was placed before him and there is no reason for this Court to interfere with it on review.
- [47] It follows that the application for review stands to fail.
- [48] The Third Respondent's section 158(1)(c) application is opposed because of the fact that the arbitration award was subject to review. The review application failed and there is no other reason why the arbitration award cannot be made an order of Court.

Costs

- [49] This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.
- [50] In *Zungu v Premier of Kwazulu-Natal and others*⁷ the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters, but that the Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court and have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

⁷ (2018) 39 ILJ 523 (CC).

- [51] This is a case where the Court has to strike a balance, considering the requirements of law and fairness.
- [52] Mr Eastes argued that this is a case where a cost order is justified, considering the conduct of the Applicant when it persisted with the employee's dismissal, notwithstanding the fact that he submitted medical certificates and the fact that his services were terminated without affording him any pre-dismissal procedure. Mr Eastes' arguments are not without merit.
- [53] The Applicant submitted that there should be no order as to costs. The Applicant followed the procedure as they understood it. This argument is far from convincing.
- [54] *In casu* the Third Respondent was compelled to engage in litigation and oppose a meritless application. A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success. A review application is not the next automatic step after arbitration and the practice to review arbitration awards where the decision or the outcome is reasonable, should be discouraged.
- [55] In the premises, I make the following order:

Order

1. The application for review is dismissed with costs.
2. The arbitration award issued on 23 March 2015 under case number NWD 111403 is made an order of Court.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

Applicant: Advocate Mashele

Instructed by: Leepile Attorneys

Third Respondent: Advocate J Eastes

Instructed by: Maenetja Attorneys