



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR1556/17

In the matter between:

PRESTIGE COSMETICS GROUP (PTY) LTD

Applicant

and

THEMBA CEDA N.O.

First Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

AMANDA SISHI

Third Respondent

TEBOGO LEKABA

Fourth Respondent

Application heard: 19 June 2018

Judgment delivered: 20 June 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an unopposed application to review and set aside an arbitration award issued by the first respondent, to whom I shall refer as 'the arbitrator'. In his award, the arbitrator found that the third and fourth respondents had been unfairly dismissed, and ordered that they be paid compensation equivalent to eight and seven months' salary respectively.
- [2] The facts giving rise to the dispute between the parties are recorded in the arbitration award and I do not intend to repeat them here. The applicant's case was that the third and fourth respondents, who had been appointed as beauty consultants, were dismissed for poor work performance. Evidence was given of the third and fourth respondent's failure to meet required performance targets and of what were described as performance reviews. In his analysis of the evidence, the arbitrator found that although the applicant had conducted performance investigations, no counselling been provided to the third and fourth respondents and that it had not been established what their shortcomings were, or in what manner the applicant was going to assist the third and fourth respondents to improve their performance. In particular, the arbitrator held that 'it defied logic and sense' that the third and fourth respondents had been subjected to poor performance investigations in circumstances where the shop in which they worked was ranked second nationally, and had experienced a growth of 11%. Further, the arbitrator found that it was 'nonsensical' for employees who reach the targets to be able to 'share' their targets with poorer performing employees. In regard to procedural fairness, the arbitrator found despite evidence that the poor performance investigations had been conducted, that these were not hearings and that the dismissals were consequently procedurally unfair.
- [3] The applicant has raised two grounds for review. The first is that the arbitrator committed misconduct in the course of the proceedings and secondly, that he failed properly to apply his mind to the evidence, ignored evidence, and misconstrued the evidence before him to the extent that his conclusion was

entirely disconnected from the material that served before him. The applicant avers that in the circumstances, the conclusions reached by the arbitrator could not be reached by a reasonable decision-maker.

- [4] I do not intend to canvass the first ground for review in any detail. The record discloses that the arbitrator played an active role in the proceedings, that he descended into the arena by putting versions and hypothetical scenarios to the applicant's witness and questioning closely the manner in which the poor performance hearings had been conducted. Arbitrators must necessarily be afforded some degree of latitude in the manner in which they conduct proceedings, and not all forms of intervention necessarily disclose bias. Given my finding in relation to the second ground of review, it is not necessary for me to make any finding in this regard.
- [5] In relation to the arbitrator's assessment of the evidence, the position is rather different. The applicant's witness led extensive evidence on the performance review sessions that were conducted with the third and fourth respondents and the nature and content of those sessions. This evidence was not disputed by the third and fourth respondents. Despite that, the arbitrator found that the third and fourth respondents had been unfairly dismissed because no hearing held. This finding is fundamentally inconsistent with the undisputed evidence and with the principle that in cases of alleged poor performance, a disciplinary-type hearing is not appropriate. Further, the applicant led extensive evidence, which was also undisputed, on the performance targets set for the third and fourth respondents and their failure to meet those targets. Evidence was also led of the extensive training on the applicant's product range that was afforded to the third and fourth respondents. The third and fourth respondents were subjected to at least three performance review sessions in order to determine the reasons for their failure to meet the required targets. Guidance and counselling were offered but despite these efforts, the targets were not met. This evidence was not referred to nor evaluated. Finally, the store's ranking or the growth that it had demonstrated was not relevant to the question whether the third and fourth respondents had met the

required performance standards. At issue was the individual performance of the third and fourth respondents, not the performance of the store in which they were employed.

- [6] In my view, the arbitrator's failure properly to assess the evidence before him had the consequence of the result or outcome that was unreasonable. There is a fundamental disconnect between the material that served before the arbitrator and the conclusion to which he came. The award accordingly stands to be reviewed and set aside.
- [7] In the circumstances, the court has a discretion either to remit the matter for rehearing, or to substitute the award. Given that the applicant's primary complaint, as I have indicated above, is one that relates to the manner in which the arbitration hearing was conducted, it is appropriate, in my view, to remit the matter for rehearing before a different commissioner.

I make the following order:

1. The arbitration award issued by the first respondent under case number GAJB 2181/17 on 4 July 2016 is reviewed and set aside.
2. The matter is remitted to the second respondent for a rehearing before the commissioner other than the first respondent

André van Niekerk
Judge

REPRESENTATION

For the applicant: Ms. T Moyo of Snyman Attorneys

LABOUR COURT