



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not of interest to the judges

Case no: JR 2702/14

In the matter between:

DR KENNETH KAUNDA DISTRICT MUNICIPALITY

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

KOBUS ERASMUS N.O.

Second Respondent

IMATU obo MOLEFE M

Third Respondent

Heard: 22 June 2017

Delivered: 22 June 2017

Edited: 28 November 2018

EX TEMPORE JUDGMENT

SALOOJEE AJ

- [1] This is an application to review and set aside the second respondent's ("the commissioner's") award which found the employee's dismissal to be both procedurally and substantively unfair. The commissioner also ordered reinstatement together with back pay.
- [2] The overarching impression of the grounds of review is that the employee assisted fellow employees in litigation against his employer. I have an issue with this approach as an employee should be able to exercise his rights he has in the Constitution, as well as the Labour Relations Act. The employer's complaint is that the employee assisted his fellow employees under the guise that he was sick to attend the Labour Court and that the commissioner ignored this fact or issue. However, this issue is canvassed in the award and one just has to look at paragraphs 35.4 until paragraph 35.7.
- [3] The second ground of the review is a refusal of a postponement at the commencement of the hearing. The commissioner dealt with this issue if one has a look at paragraph 7 to 10 of the award. The commissioner refused the postponement on this basis that the employer asked for a postponement because its legal representative was not present at the hearing. However, at the time the employer had not made an application for legal representation.
- [4] The third ground review is that there were nineteen charges proffered against the employee. One just has to look at paragraph 35.1 of the award which the applicant's representative read into the record and that will be the paragraph dealing with the "shotgun" approach.
- [5] The fourth ground of review, which I find to be a strange ground of review as it seems to come up on many different occasions, is that the commissioner ignored facts that were presented at the disciplinary hearing. It is trite law that the arbitration is a hearing *de novo* and unless evidence is specifically referred to in the arbitration hearing, the commissioner cannot take it into account.

- [6] The nub of the commissioner's findings is based on Clause 6.3 of the disciplinary code. Clause 6.3 states that after being aware of misconduct that the employer shall proceed within a period of three months be charged for, proceed with disciplinary hearing and in the event that the employer does not do so within the stipulated timeframe, the employer should apply for condonation. The employer did not do so and the basis of procedural unfairness finding is based on the interpretation of Clause 6.3.
- [7] Now, the standard in a review application is whether a commissioner arrived at a conclusion that no other reasonable commissioner could arrive at. In the *Goldfields* case, the Labour Appeal Court stated that when reviewing an award the court must consider whether the commissioner considered the principal issue, evaluated facts presented at the hearing and came to a conclusion that is reasonable.
- [8] The commissioner considered the principal issue and this can be found in paragraphs 1 to 3 of the award.
- [9] The commissioner also evaluated the facts presented at the arbitration hearing. The grounds of review do not amount to much and based on the evaluation of the commissioner's facts at the hearing, the commissioner did come to a conclusion that is reasonable.
- [10] On the issue of costs the employer submitted they would not seek costs against the employee however no address is made for the other side. In relation, the employees' representatives submitted that should the employee be successful the employee should be awarded costs. I see no reason for this court should depart from the principle that costs should not follow the cause.

Order

- [11] In the premises, the following order is made.

1. The application is dismissed.
2. The applicant is to pay the cost of the third respondent.

Y SALOOJEE

Acting Judge of the Labour Court of South Africa