



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR186/2016

In the matter between:

NEHAWU obo DANIEL MLAMLI BODLANI

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE

First Respondent

SUPERINTENDENT-GENERAL FOR DEPARTMENT

OF EDUCATION, EASTERN CAPE PROVINCE

Second Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Third Respondent

COMMISSIONER C. VAN DER BERG NO

Fourth Respondent

Heard: 29 November 2018

Delivered: 04 December 2018

JUDGMENT

MAHOSI. JIntroduction

- [1] This is an application in terms of section 145 of the Labour Relations Act (LRA)¹ in terms of which the applicant (NEHAWU) seeks an order to review and set aside an arbitration award issued by the fourth respondent (arbitrator) under case reference number NWD 091402. In his award, the arbitrator found the dismissal of Mr Bodlani (the employee) to be procedurally and substantively fair.
- [2] The key question is whether the arbitrator failed to apply his mind to the relevant evidence and consequently made an award, which no reasonable arbitrator could make.

Background

- [3] Prior to outlining the NEHAWU's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties. These facts are not in dispute and were summarised by the arbitrator in his award as follows:

[5] In 2002 there was a restructuring process where the Department of Sport was separated from the Department of Education, which resulted in some offices and districts being integrated into single district/s. All affected employees were given an option to either remain with Department of Education or migrate to Department of Sport and as such the Applicant elected to remain with the respondent.

- [6] This undertaking necessitated the Department of Education to establish task teams, which were responsible for the placement of all affected employees. The availability of vacant posts in some districts did not meet the demand of choices made by the affected employees, which amounted to affected employees being placed in districts, which were not necessarily their preference. Subsequent to that, the

¹ Act 66 of 1995 as amended.

respondent argued that the applicant was placed in Ngcobo district, which is 80 kilometers from Mthatha district. The applicant's case is that the respondent never informed the applicant of his placement.

[7] On the 10th of September 2009, the respondent notified the employee of a disciplinary hearing. The charges against the applicant related to absenteeism and/or unauthorized absence from work.

[8] After various postponements the disciplinary hearing was concluded and the applicant was dismissed on 07 June 2010. The applicant lodged an appeal, which was upheld and finalized on 05 December 2013.

[9] The applicant referred his alleged Unfair Dismissal dispute to the Education Labour Relations Council.

[4] The dispute was conciliated unsuccessfully before it could proceed to arbitration. The arbitration proceedings were held on 8 March 2016 and 11 June 2016. At the end of the arbitration, the arbitrator found that the dismissal of the employee was both procedurally and substantively fair. Dissatisfied with the arbitrator's findings, NEHAWU launched this application.

Grounds of Review

[5] Although NEHAWU raised a number of grounds of review, the question is mainly whether the arbitrator evaluated the facts presented before him and arrived at a conclusion that is reasonable.

[6] On the one hand, the Department's contention was that the employee was guilty of the charges that were levelled against him because although he was aware of his transfer to Engcobo district, he failed render his services to the Department of Education as from 2002 to date. On the other hand, NEHAWU's contention was that the employee was never given placement or transfer letter.

Applicable law

- [7] The arbitration awards are reviewable in terms of section 145 of the LRA, which provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. Section 145(2) defines a defect as the commissioner's misconduct in relation to the duties of the commissioner as an arbitrator, gross irregularities in the conduct of the arbitration proceedings, exceeding the commissioner's powers or improperly obtaining an award.
- [8] The test for review which has been authoritatively stated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² was reiterated in *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*³ as follows:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls in one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular fact, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'⁴

² 2007 (28) ILJ 2405 (CC) at para 25.

³ 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013 (34) ILJ 2795 (SCA).

⁴ At para 25.

- [9] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*,⁵ the Labour Appeal Court (LAC) stated as follows:

[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

[18] In a review conducted under s145(2)(a)(c) (ii) of the LRA, 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 one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

- [10] In *Head of the Department of Education v Mofokeng and Others*⁶ the LAC confirmed *Herholdt* and *Mofokeng* judgments and held as follows:

'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, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will 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.

- [11] The LAC further held as follows:

⁵ [2014] 1 BLLR 20 (LAC) at paras 17 and 18.

⁶ [2015] 1 BLLR 50 (LAC) at para 30.

'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 would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'⁷ [Footnotes omitted]

Analysis

[12] NEHAWU attacked the arbitration award on the basis that the arbitrator failed to apply his mind to the relevant evidence and consequently made an award which no reasonable arbitrator could make in that he concluded, despite the absence of the transfer letter issued by the Head of Department, that the employee was transferred to Engcobo district. In so doing, argued NEHAWU, the arbitrator ignored the provisions of section 6(1)(b) and 8(1)(c) of the Employment of Educators Act (EEA)⁸. Section 6 provides as follows:

⁷ At para 33.

⁸ Act No. 76 of 1998, as amended.

- ‘6. Powers of employers—(1) Subject to the provisions of this section, the appointment of any person, or the promotion or transfer of any educator—
- (a) in the service of the Department of Basic Education shall be made by the Director-General; or
 - (b) in the service of a provincial Department of Basic Education shall be made by the Head of Department.’

[13] Section 8(1)(c) provides as follows:

- ‘(c) The Head of Department may transfer any educator in the service of the provincial Department of Basic Education to any other post in that department.’

[14] NEHAWU further relied on the findings of Court in *Daniel Mlamli Bodlani v The MEC, Department of Education, Eastern Cape Province and the Superintendent-General Department of Education, Eastern Cape*.⁹ This is a judgment of the urgent proceedings that were instituted by the employee in the High Court challenging the respondents’ decision not to pay his salary for the months of May and June 2007. He further sought an order for the respondents to continue to pay his salary until such time that he reaches retirement age or resigns from the Department’s employment. In its judgment the Court found as follows:

‘[21] The respondents failed to properly notify the applicant of his placement at Engcobo. They failed to revert to him as undertaken by the respondents in a letter dated 7 March 2007 and addressed to the applicant’s (his) Mthatha residence. In that letter the respondents advised that the applicant’s placement had been referred to the local Mthatha HRAT Chairperson (District Director) as the delegated officer dealing with matters such as the applicant’s. The next letter written on the 8 May 2007, addressed to the applicant at an Idutywa address, advised that the applicant’s matter was still receiving attention and that he would be advised of the outcome in due course. At the end of the same month, the respondents withheld the

⁹ Case No. 890/2007

payment of the applicant's salary because, they submitted, they could not locate him. The respondent's actions were thus completely out of kilter and inconsistent with what was communicated to the applicant in the March and May correspondence.'

[15] The Court further found that the employee's expectation to have his salary paid was justified until the matter of his placement has been resolved or steps taken to utilize section 14 of EEA in deeming him to have absconded or instituting an disciplinary hearing for misconduct. The High Court then made the following order:

- '1. That the decision taken by the respondents not to pay the applicant's salary for a period May 2007 to date is hereby declared unlawful, unconstitutional and contrary to his rights to fair administrative action.
2. That the respondent be and are hereby ordered and directed to pay the applicant's salary for period May 2007 to date with immediate effect.
3. That pending proper placement of the applicant alternatively the institution of an investigation into his failure to render services, further alternatively his discharge in terms of the law, the respondent is directed to reinstate the applicant's benefits and remuneration package fully.'¹⁰

[16] In the current matter, the existence of the rule regarding absenteeism in the workplace was not in dispute at the arbitration. Its validity, reasonableness and knowledge by all the educators, including the employee, were also not in dispute. There was further no evidence before the arbitrator that the respondents have not applied the rule or standard consistently. The issue before the arbitrator was whether the employee contravened any of the rules as per the charge sheet and if so, whether dismissal was the appropriate sanction.

¹⁰ At para 28

- [17] The undisputed evidence before the arbitrator was that on 23 October 2003, the employee addressed a letter to the district Director, contents of which are as follows:

'Transfer myself from Engcobo to Umthatha as FES (Exams)

I, Daniel Mlambi Bodlani hereby apply to be transferred from Engcobo to Umthatha as a First Education Specialist (Exams). I was placed at Engcobo as FES (Curriculum Senior Phase). I phoned DIP office at Zwelitsha and Pumla confirmed my placement to Engcobo as FES (Curriculum Senior Phase).

I will be very glad if this transfer can be effected as soon as possible. Thanking you in anticipation.'¹¹

- [18] On 12 January 2004, the employee addressed another letter to the district Director in which he stated as follow:

'APPEAL FOR PLACEMENT IN UMTATHA: PERSAL 52631397

I am a qualified as a First Education Specialist but I find myself doing nothing and my talents are being wasted by my department. It is irregular and unpalatable that having been educated and employed, I should be relegated to nothing. I need to be placed in Umthatha as I have indicated in my choice letter for placement. Any placement in other district will be under severe protest as there are many vacancies in Umthatha. Such placement should be please be in writing and not rumoured.'¹²

- [19] On 8 March 2004, the employee addressed a letter to the Chief Education Specialist and stated the following:

'Appeal for placement in Umthatha.

During the rationalisation process of 2000 I opted to remain in the Department of Education. I was still in Elliotdale then. The Department of Education in 2003 was conducting interviews for the placement of First Education Specialist additional to the department. This process was chaired by Mr. Nuku, who is the district director of Libode district. The outcome of that

¹¹ Index to pleading, page 39

¹² Index to pleadings, page 40

process ended up with me placed in district I never applied to which is Engcobo. I forwarded my appeal to both Mr. Nuku and Ngwanya. The outcome of that intervention made Mr. Ngwanya to verbally agree that I be placed in a vacancy in Umthata. Now there is a bulletin for FES posts and I feel that I should be given first preference as I am already in this level that other people are applying for.

Kindly treat this with urgency it deserves.’¹³

- [20] NEHAWU submitted that the arbitrator ignored the evidence that the employee reported at Engcobo district to verify his placement but was not accepted by Mr. Mvambo and Ms. Ngambu, demanding a transfer letter which he did not have. This submission is not supported by the arbitrator’s finding where he stated as follows:

‘In addition, the fact of the matter is that when the applicant visited the Ngcobo office, he left knowing that he had to obtain his transfer letter. Instead of reporting to the Respondent’s offices to obtain not only clarity but also this “letter” placing him at Ngcobo, the applicant remained home and started to “write letters” requesting that he be placed in Mthatha. This in itself is sufficient evidence to conclude that the employee knew he was placed in Ngcobo. Even after it was confirmed in writing that he will not be placed in Mthatha as requested, the applicant still did not report for duty in Ngcobo nor did he make any effort to get the transfer letter in order to assume his duties in Ngcobo.’¹⁴

- [21] Having had regard to the evidence before him, the arbitrator found that there was sufficient evidence before him to conclude that the employee knew about his placement at Engcobo. He further found that the employee “failed to report for duty for a substantial amount of time continuing to insist to be placed where he wanted to work instead of reporting for duty as required.” It is apparent from the reading of the award that the arbitrator was further alive to the judgment of the High Court when he found that the respondents followed

¹³ Index to pleadings, page 41

¹⁴ Index to pleadings, page 31

due process as ordered thereby. This appears on the following part of his award:

'Further to that the applicant, based on all the evidence before me, only really started to address the matter with urgency when the respondent stopped paying his salary, which he then challenged in a court case. This matter of stopping his salary was dealt with by the courts however the respondent still had to deal with the fact that the employee was not reporting for duty. The court ordered the respondent to investigate the applicant's failure to report for duty and, if required, institute disciplinary action after a disciplinary hearing. Even at this point, when the applicant was aware that his absence was viewed by the respondent as unauthorized, the applicant failed to report for duty.'¹⁵

- [22] There is no merit to NEHAWU's submission that no evidence was put before the arbitrator to prove that the Head of Department had delegated or assigned any person in the service of the provincial Department of Education to effect the employee's transfer or placement. The correspondences between the parties clearly show that the employee was aware that he was transferred to Engcobo district. No evidence was put before the arbitrator to show that a written letter was a requirement for transfer in this regard. Section 8(1)(c) of EEA provides that the Head of Department may transfer any educator in the service of the provincial Department of Basic Education to any other post in that department and is silent about the manner in which such transfer may be effected.
- [23] NEHAWU submitted that the employee had no obligation to demand a letter of transfer from the respondents. It could be that there was no obligation on the employee to demand a letter of transfer from the respondents, but he surely had an obligation to report for duty in terms of his contract of employment. If it is accepted that the employee was turned away for lack of the transfer letter, the reasonable reaction should have been to contact the respondents in order to be provided with a transfer letter to Engcobo district or at least, he should have reported to Engcobo district or any other nearest

¹⁵ Index to pleadings, page 31

district instead of being content with staying at home and receiving a salary for about 5 years without rendering his services. Thus, the arbitrator did not misconstrue the law or commit an error of law by concluding that the employee should have made efforts to get the transfer letter in order to assume his duties at Engcobo. The arbitrator clearly assessed the evidence before him and arrived at a reasonable conclusion.

- [24] The manner in which the arbitrator analysed the dispute before him does not support the NEHAWU's version that he misconstrued the enquiry he had to conduct or failed to consider the evidence before him. NEHAWU further failed to establish that the arbitrator conducted the enquiry incorrectly because, as the award reflects, he dealt with the issue before him correctly.
- [25] What the NEHAWU seeks to do, in this application, is to bring an appeal against the decision of the arbitrator in a guise of a review. It is my view that the decision of the arbitrator is not a decision that a reasonable decision-maker could not reach. It is a reasonable decision that is justified by the evidence that was placed before the arbitrator. There is, therefore, no reason for this Court to interfere with the arbitrator's award.
- [26] With regard to costs, taking into account the requirements of law and equity, I believe that this is a matter in which there should be no order as to costs.
- [27] In the circumstance, I make the following order:

Order

1. The application for review is dismissed.
 2. I make no order as to costs.
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D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate M. Nduzulwana

Instructed by: W. Mdlangazi Attorneys

For the Respondent: Advocate A.M Da Silva

Instructed by: State Attorney