THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2158/17

In the matter between:

ANGEL KHALE SEKGOTHO **First Applicant**

NOLUSINDISO MAJOLA **Second Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER RAYNOLD BRACKS N.O. **Second Respondent**

ABSA BANK LIMITED **Third Respondent**

Heard: **16 January 2019**
Delivered: **12 June 2019**
Summary: **Review of arbitration award – misconduct dismissal – review application dismissed – decision reached by the commissioner that the dismissal of the employee was substantively and procedurally fair, was one that a reasonable decision maker would arrive at.**

JUDGMENT

KING, AJ

Introduction

[1] The First and Second Applicants launched an application to review and set aside the Second Respondent's arbitration award dated 13 September 2017, which was issued under case number GAJB7668-17 and received by the Applicant on 22 September 2017 (the award). The application is opposed.

[2] In terms of the award, the Second Respondent found that the First and Second Applicant's dismissal was substantively and procedurally fair and accordingly dismissed their case.

[3] The First and Second Applicants seek an order substituting the award with an order that their dismissal by the Third Respondent was procedurally and substantively unfair and directing that the Third Respondent reinstate them from the date of dismissal with no loss of benefits, alternatively pay them maximum compensation with interest, alternatively referring the dispute back to the First Respondent for arbitration by a commissioner other than the Second Respondent.

Background

[4] Briefly, the facts of this matter are that the First Applicant was employed by the Third Respondent on 1 October 2005. The Second Applicant was employed by the Third Respondent as a temporary employee in 2005 and was made a permanent employee during August 2014.

[5] Prior to the First and Second Applicants dismissal, the Applicants had referred an unfair labour practice dispute to the First Respondent under case number GAJB1826-17. As at the date of arbitration in respect of the unfair dismissal dispute (which arbitration award is the subject of this review application), the unfair labour practice dispute had not been adjudicated as a ruling had been issued by Commissioner Faizel Moai of the First Respondent on 19 May 2017, in terms of which the arbitration in respect of the unfair labour practice dispute

was postponed *sine die*, pending the outcome of the unfair dismissal dispute. Insofar as the First and Second Applicants had been reinstated, they could then request that their unfair labour practice dispute be re-enrolled for hearing.

[6] Both the First and Second Applicants were issued with final written warnings valid for a period of 12 (twelve) months during March 2017 for insubordination and for not following policies and procedures. Both the First and Second Applicants failed to attend the disciplinary consultations, which resulted in the final written warnings being issued and both the First and Second Applicants did not challenge the validity of the final written warnings issued to them following the disciplinary consultation on 16 March 2017.

[7] The First and Second Applicants were dismissed from the employ of the Third Respondent following disciplinary hearings held on 6 April 2017. The First and Second Applicants failed to attend the disciplinary hearings despite being issued with notices to attend the disciplinary hearings. The charges brought against the First and Second Applicants at the disciplinary hearings were as follows: -

> "**1. Charge 1: Insubordination**
>
> It is alleged you failed to adhere to clear instructions from your line manager to discuss, submit, review and finalise your PD objective/plan for the year 2017.
>
> **2. None-adherence to Management Standards and Performance Development PD – policy**
>
> It is alleged that you failed to adhere to the **Management Standards on Performance Development PD – policy**, to take any responsibility regarding your PD objective/plan, as set out in section 2."

[8] The First and Second Applicants challenged the substantive and procedural fairness of their dismissals by referring an unfair dismissal dispute to the First Respondent under case number GAJB 7668-17.

[9] The unfair dismissal dispute was arbitrated over several dates. The Second Respondent issued the award on 13 September 2017, which dismissed the First and Second Applicants' case on the grounds that the Second Respondent found that the dismissals of the First and Second Applicants by the Third Respondent were substantively and procedurally fair.

[10] The First and Second Applicants' grounds for review are reflected in their founding affidavit, which are amplified in their supplementary affidavit. I do not intend repeating such grounds of review here, but will deal with them in the analysis hereunder.

Analysis

[11] I do not deem it necessary to extensively address the relevant test to be applied in proceedings such as this. The test laid down in the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines*[1], namely that an arbitration award will be reviewable if it is one that a reasonable decision maker could not reach, is well established.

[12] The Labour Appeal Court (LAC) confirmed in *Fidelity Cash Management Services v CCMA*[2], that there can be no doubt under *Sidumo* that:

> "12.1 the reasonableness or otherwise of a commissioner's decision does not depend – at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding

[1] [2008] 2 *BCLR* 158 (CC).

[2] [2008] 29 *ILJ* 964 (LAC).

> is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision."

[13] Ultimately, whether or not an arbitration award or decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her.

[14] The LAC in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration*[3], stated the applicable test as follows:-

> "In short, a review 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 which was reasonable".

[15] I will now deal with the various grounds of review as relied on in the First and Second Applicants' founding and supplementary affidavits. Gross irregularities and misconduct committed by the Second Respondent: -

Failing to take into consideration the totality of evidence adduced during the arbitration hearing.

[16] The First and Second Applicants allege that the Second Respondent failed to consider all the evidence, which included the background of the dispute. In this regard, the First and Second Applicants had referred an unfair labour practice

[3] [2014] 1 BLLR 20 (LAC) at para 16.

dispute in regard to the fact that they were not happy with the work that they were doing and the pay that they were receiving after having been promoted from level BA3 to BA4. The First and Second Applicants allege that the Second Respondent had a duty to determine the reasonableness of the conduct of the Third Respondent to effectively charge them for exercising their rights, which were supposed to be protected by the labour laws of South Africa. The First and Second Applicants allege, *inter alia*, further that the Second Respondent effectively committed a gross irregularity insofar as he ignored what was at the heart of the dispute before him.

[17] On consideration of the evidence presented at the arbitration, it is clear that a significant portion of the evidence submitted by both the First and Second Applicants and the Third Respondent, was in relation to the alleged unfair labour practice dispute, which had been brought by the First and Second Applicants. The award sets out a significant amount of the detail in relation to the evidence submitted by the witnesses at the arbitration proceedings and appears to have considered the evidence in detail in his arbitration award. It appears from the transcript of evidence at the arbitration proceedings that one of the main elements in regard to the First and Second Applicants unfair labour practice dispute, was in regard to the level of remuneration they had received when they were promoted from level BA3 to BA4. I am not convinced that the Second Respondent ignored the evidence presented by the First and Second Applicants and accordingly, this ground for review cannot succeed.

Splitting of charges

[18] The First and Second Applicants allege that the Second Respondent did not take into consideration the argument of splitting of charges by the Third Respondent, despite being extensively dealt with during the arbitration hearing. Whilst it may be argued by the First and Second Applicants that the Second Respondent did not extensively set out his reasons for rejecting their submission that there was a splitting of charges, I am not convinced that the argument submitted by the First and Second Applicants in regard thereto, even in the event of the Second Respondent finding that there had been a splitting of

the charges, would have resulted in the First Respondent making any different determination.

Charge of insubordination vs charge of gross insubordination with reference to the disciplinary code of the Third Respondent

[19] Whilst it appears from the evidence submitted at the arbitration hearing that the First and Second Applicants were not specifically charged with gross insubordination, I am not persuaded that the failure on the part of the Third Respondent to charge the First and Second Applicants with gross insubordination should not have warranted a dismissal. In this regard, I agree with the Second Respondent that the Third Respondent had made numerous attempts to persuade the First and Second Applicants to sign the PD objectives. It appears that the First and Second Applicants would not even engage with the Third Respondent in any constructive manner and merely relied on the fact that they had referred an unfair labour practice dispute to the First Respondent. I am not convinced that employees who refer disputes under the auspices of the First Respondent can essentially claim "amnesty" for any subsequent conduct in the workplace pending the outcome of the dispute already referred. I am of the view that the First and Second Applicants' blatant refusal to engage constructively (or at all) with the Third Respondent in regard to their PD objectives, amounts to insubordination.

[20] It appears from the evidence that the Third Respondent embarked upon a process of progressive discipline in as much as, during March 2017 it issued both the First and Second Applicants with final written warnings for insubordination and not following policies and procedures.

[21] It is important to note that the Second Respondent in the award does not find the First and Second Applicants guilty of gross insubordination, but in fact at paragraph 92 finds them guilty of insubordination. Given the fact that it is common cause that the First and Second Applicants had already been issued with final written warnings for the very same conduct, which they did not challenge and which remained valid as at the date of their dismissal, it cannot

be expected of any employer to have issued further final written warnings as it would defeat the very purpose of progressive discipline.

[22] The fact that the First and Second Applicants refused to attend the disciplinary consultations, which resulted in the issuing of the final written warnings as well as the disciplinary hearings, which resulted in each of their summary dismissals, is further evidence of their belligerent and obstructive conduct towards the Third Respondent as their employer.

[23] The First and Second Applicants' submission that the insubordination charge, if proven, still does not warrant the sanction of dismissal cannot be accepted. The First and Second Applicants had already received final written warnings which were valid at the time of their dismissal in respect of the same conduct.

[24] It is common cause that the First and Second Applicants refused to attend the disciplinary consultations, which resulted in the final written warnings. Further, they did not challenge the validity of the final written warnings when they were issued to them. I am not persuaded after having considered the transcript of the arbitration proceedings that the First and Second Applicants submitted any material evidence, which would result in the final written warnings issued to each of them during March 2017, being declared invalid and of no force or effect.

[25] In cases of employees being subjected to a final written warning, I agree with the judgment in *Transnet Freight Rail v Transnet Bargaining Council and Others*[4], where it was stated that employees already on a final written warning leaves the employer with little choice but to dismiss them. In this judgment[5] the Labour Court further concluded that the presence of a valid final written warning at the time of the commission of the same or similar form of misconduct should be properly interpreted as aggravating in nature, and that

[4] (2011) 32 ILJ 1766 (LC) at para 38.

[5] Ibid at para 42.

the principles of progressive discipline required such a re-offending employee usually to be considered irredeemable.

Descending into the arena by assuming that the First and Second Applicants had legal representation

[26] Whilst I agree that the Second Respondent should not merely have made an assumption that the First and Second Applicants would have sought legal advice in respect of the final written warnings, it is common cause that they were legally represented in their unfair labour practice dispute. Even if I were to find that the Second Respondent erred in making such assumption, such assumption did not have the result that the Second Respondent descended into the arena. I am not convinced that the Second Respondent's assumption in this regard would have materially impacted upon the outcome of the award.

Conclusion

[27] I therefore conclude that the review application falls to be dismissed, as I am not persuaded that the decision reached by the Second Respondent that the dismissals of the First and Second Applicants by the Third Respondent were substantively and procedurally fair, was not one that a reasonable decision maker would arrive at.

[16] In the premises, I make the following order:

Order:

1. The review application is dismissed.

2. There is no order as to costs.

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L King

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Mkhize of Mkhize Attorneys

For the Third Respondent: Advocate Z M Novsa

Instructed by: Cliffe Dekker Hofmeyr Inc.