THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR 2580/17

In the matter between:

BAURENCIA EUNICE NONGALAZA **Applicant**

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **First Respondent**

VENTER, PM *N.O.* **Second Respondent**

SOL PLAATJIE MUNICIPALITY **Third Respondent**

Heard: 1 August 2019

Judgment delivered: 5 August 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 12 September 2017. In his award, the arbitrator appealed the dismissal of the applicant after finding that she had committed misconduct that warranted the termination of her employment.

[2] The review application was filed outside of the statutory time limits and the applicant has applied for condonation. That application was not opposed, and the late filing of the application is accordingly condoned.

[3] The material facts are captured in the award and I do not intend to repeat them here. For present purposes, it is sufficient to state that the applicant was employed on 1 January 2011 as a human resources administrator, and remained in that position until the date of her dismissal, 20 June 2017. The applicant was dismissed on charges of dishonest conduct relating to the processing of transactions on the third respondent's IT system. In particular, it was alleged that she was party to a transaction in which an employee (Kilelo) sold leave days to which she was not entitled, and that she processed an application for the sale of leave days in respect of an employee (Koopman) who had never applied to sell leave. Submissions were made in the present proceedings regarding the formulation of the allegations of misconduct against the applicant, and in particular, submission to the effect that the charge against her was one of fraud and that the elements of fraud had not been proved. The wording of the charges is sufficiently broad to incorporate dishonest conduct relating to the undue payments concerned and indeed the finding of the arbitrator is that the applicant

had not been honest in her dealings with her employer and that she was guilty of very serious misconduct.

[4] The arbitration hearing assumed a form that is not usual. The arbitrator clearly canvassed the issues in dispute and on the basis of what was common cause, the parties agreed that a report by a forensic investigator ought to be admitted, that the applicant testify thereafter and that the forensic auditor be recalled as a rebuttal witness in respect of a single aspect. The report of the forensic investigator followed on an investigation into large scale fraud committed at the third respondent by what appears to be a syndicate.

[5] In his award, the arbitrator acknowledged that it was for the third respondent to establish that the applicant's dismissal was substantively fair. He recorded (correctly) that there were two mutually destructive versions before him and in respect of the first charge, concluded that there was overwhelming evidence that the transaction concerned had been captured by the applicant.

[6] The applicant's grounds for review are that the arbitrator misconceived the nature of the enquiry, that he committed a gross irregularity in the conduct of the proceedings, that he failed to apply his mind to the evidence and that he reached a decision that no reasonable decision-maker could have reached. In particular, the applicant submits that the third respondent's failure to lead evidence was fatal to its case, and that the arbitrator's conclusion that the applicant was dishonest in the absence of such evidence resulting in an unreasonable finding that cannot be sustained on the record. Further, the applicant submits that the arbitrator ignored the issue of sanction, and that had he done so, he would have concluded that dismissal was not an appropriate sanction.

[7] The applicable legal principles are well-established. This court is entitled to interfere with an award made by a commissioner if and only if the commissioner misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in

itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)). In other words, the test is two-staged. First, the applicant must establish a misconception of the nature of the enquiry or some misconduct or misdirection on the part of the arbitrator. If that is established, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.

[8] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC)), The Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one on more factors amounted to a process related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgement). Specifically, the questions for a review court to ask is whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he or she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with a substantial merits of the dispute and whether the decision is one that another decision maker could reasonably have arrived at based on the evidence (see paragraph 20). So, when arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

[9] The applicable test confirms the line between an appeal and a review – this court is not at liberty to substitute an arbitrator's decision simply because it considers

the arbitrator to have come to an incorrect decision. The applicant must meet the more exacting threshold of establishing that on the record of the evidence, and regardless of any reviewable irregularities on the part of the arbitrator, the arbitrator's decision falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence.

[10] I deal first with the procedure adopted by the arbitrator. As I have indicated, the procedure was one agreed to by the parties' legal representatives, and which resonates with the statutory purposes of informality and expeditious dispute resolution (see s 138 of the LRA). The arbitrator clearly appreciated the nature of the enquiry, even if the process adopted was not the norm. There is no merit in the attack on the award on the basis of the nature or form of the arbitration process.

[11] Turning next to the arbitrator's evaluation of the evidence, in essence, the case before him was one in which it had been agreed that applications to encash annual leave had been made and processed on the IT system, and that the applicant's user name had been utilised in each case to access the system. What the arbitrator had to decide was whether it was the applicant who had effected the changes, or whether the changes had been effected by some other person using the applicant's unique password to gain access to the system.

[12] It is correct, as the applicant submits, that she denied processing the transaction that led to Kilelo's payment of 38 leave days. It is also correct that she testified that the system was defective. The applicant's version, in essence, was that in respect of the first charge, in accordance with the applicable procedure, applications to encash leave are signed by the relevant employee and sent to a supervisor for approval. The document that formed the basis of the first charge showed that a Mrs Oktober was the employee completed and signed the form on behalf of Kilelo. It was not disputed that ordinarily, the person who completed the form (in this case, Oktober), would be the same person who processes the transaction on the system. The applicant denied that she worked on this transaction and that she had any knowledge of stood to benefit from it. In regard

to the second charge, the applicant's evidence in summary that she was instructed by her supervisor Margaret Long to complete a form to encash leave on behalf of an employee named L Koopman for periods of 31 and 36 days. The applicant testified that she complied with the instruction and had no reason to question it. The applicant assumed that the money would be paid during at the end of the current month, August 2016, and captured the form on the system. Long later advised the applicant that the payment was to be made in respect of the July 2016 pay month, and that payment therefore to be made by EFT. The applicant then destroyed the form in respect of August 2016, and completed a new form for payment in respect of July 2016. The days also changed to 31 and 41, although the applicant did not amend the number of days leave. It was submitted on the applicant's behalf that there was no evidence to show that the applicant was guilty, nor was there any evidence to reveal any payment being made consequent on the transaction. It is common cause that the transaction was cancelled when it was discovered that it was fraudulent since L Koopman had not instructed the third respondent to encash her annual leave.

[13] Theron's evidence established that no two persons could log into the same profile on the third respondent's IT system simultaneously. He testified that he had experience in systems such as that operated by the third respondent, and in the chronological records of changes made to any profile by a user logged into the system. There was no reason to call Theron's evidence into question, and it was not seriously challenged in cross-examination.

[14] I fail to appreciate how it can be said that the arbitrator committed a reviewable irregularity by preferring the third respondent's version over that of the applicant. His decision to reject the applicant's version was not unreasonable, nor did it have the result of an outcome that was so removed from the evidence that it fell into a band of decisions to which no reasonable decision-maker could come. Of particular moment here is the credibility of the applicant. She did not fare well under cross-examination and as the arbitrator observed, she was extremely evasive when questioned about the fact that the system reflected her details as the person having accessed the relevant profiles. The applicant's explanation

that it was possible for more than one user to access an employee profile at the same time was refuted by Theron's evidence, but even on the applicant's own version, she was unable to explain why she had accessed Kilelo's profile in the first place. The overall impression of the applicant's evidence is that she adjusted her testimony as the proceedings progressed, seeking ways to exculpate herself as and when the contradictions in her testimony were exposed during cross-examination. In respect of the Koopman transaction, the applicant's initial version was that she had completed the forms and taken them to Long. These were destroyed when she was given the instruction to allocate the transaction to the July pay month. Initially, the applicant testified that she had accessed Koopman's profile only once. Under cross-examination, she stated that she had done so twice – first to process the initial transaction, and thereafter to correct it. The chronology put to the applicant indicated that she had first accessed Koopman's profile at 9:49 on 1 August 2016. At 9:50, a transaction 'leave sold' was registered under the applicant's username. Thereafter, Margaret Long accessed the profile at 10:17, and a 'leave sold' transaction is recorded. The log shows the applicant re-entering the system at 10:29, until 10:33. When confronted with evidence that she had attempted to amend Koopman's initials while logged into the profile, the applicant was unable to offer an explanation. The arbitrator not unreasonably rejected the applicant's evidence that she had only entered the system once in relation to the Koopman transaction, and that she had done no more than complete the relevant forms and capture a transaction on Long's instruction.

[15] In short, the arbitrator did not commit any reviewable irregularity in relation to his assessment of the evidence and in drawing the conclusion from that evidence that the applicant was guilty of serious misconduct. In so far as the applicant attacks the arbitrator's decision that dismissal was an appropriate sanction, it is trite that arbitrators' must be afforded deference in regard to their decisions on sanction, and that the same reasonableness threshold applies to their assessments and decisions in this regard. The arbitrator cannot be faulted for

concluding that the misconduct that he found to have committed by the applicant was very serious, and that dismissal was an appropriate penalty.

[16] I am not satisfied that the applicant has demonstrated that the arbitrator committed a reviewable irregularity, or that the decision he reached failed to meet the reasonableness threshold. The application stands to be dismissed.

[17] Finally, in so far as costs are concerned, for the purposes of s 162, the interests of the law and fairness are best met by each party bearing its own costs. It is not clear whether the application is supported in these proceedings by a trade union, but I will give her the benefit of the doubt and apply the protocol in terms of which this court rarely orders individual employees who seek recourse against their employers to pay the costs of the proceedings.

I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr. M Makhura, Cheadle Thompson & Haysom Inc.

For the respondent: Adv. F Venter instructed by Van De Wall Inc