

SOUTH AFRICA / JUDGMENT

Coetzee v Snqobile Equestrian Security Services (Pty) Ltd and Others (JR494/17) [2021] ZALCJHB 36 (28 January 2021)

[2021] ZALCJHB 36

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

JR494/17

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR494/17

In the matter

between:

TERTIA
COETZEE
Applicant
and
SNQOBILE EQUESTRIAN
SECURITY
SERVICES (PTY)
LTD
First Respondent
COMMISSIONER
SIBONGISENI SITHOLE
Second Respondent
COMMISSION FOR
CONCILIATION MEDIATION
AND ARBITRATION
Third
Respondent

Heard:

03 December 2020

Delivered:	This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 28 January 2021.
Summary:	Review application – where there is no fair trial of the issues, the outcome would be unreasonable.

JUDGMENT

NKUTHA – NKONTWANA, J

Introduction

- [1] The applicant seeks to review and set aside the arbitration award in terms of section 145 of the Labour Relations Act[1] (LRA) rendered by the second respondent (Commissioner) under the auspices of the third respondent, Commission for Conciliation

Mediation and Arbitration (CCMA), under case number GAVL3306-16 and dated 1 February 2017. The commissioner dismissed the applicant's unfair dismissal claim.

- [2] The applicant's main ground of review is that impugned award contains reviewable irregularities and as such unreasonable. The first respondent is opposing the application. Mr Maloka, counsel for the first respondent, appeared in court alleging that he was instructed by Molebaloa Attorneys. However, applicant's attorney, Mr Boshoff, objected to Mr Maloka's appearance as Molebaloa Attorneys were not on record as representing the first respondent. Mr Maloka was given an opportunity to attend to the issue pertaining to his brief and subsequently withdrew his appearance.

Pertinent facts

- [3] The facts in this matter are mostly common cause. The applicant was employed by the first respondent with effect from May 2005. At the time of her dismissal, 10 August 2016, she had just been promoted to a position of General Manager Operations and was earning R40 000.00 per month.
- [4] The first respondent is a security company. The applicant was responsible for procuring cellphones, radios and uniform from the first respondent's suppliers. It is common cause that Mr Ndwandwe, the owner of the first respondent, instructed the applicant to increase airtime in relation to two cellphone numbers and upgrade or migrate three cellphone contracts to R500 and the other to RED VIP. The instruction was issued verbally in a meeting between the applicant and Mr Ndwandwe.

[5] On 15 July 2016, the applicant contacted the supplier, Twin Radio, and the instructed them as follows:[2]

‘Please [add] the following airtime:

0828838862 R275.00

0822656612 R275.00

[Migrate] contracts to:

0609871277 R500

0609881283 R500

0828841742 RED VIP’

[6] It was the applicant’s uncontested evidence that during the discussion with Twin Radio she enquired whether it was possible to migrate the contracts and secure new cellphones with no additional costs to the first respondent. She was assured that it was possible. Since her cellphone was old, she then ceased the opportunity and asked for the migration deal with new cellphones with no additional costs to the fist respondent. The deal was indeed processed and she accordingly received two new cellphones. She gave one to Mrs Ndwandwe, who was also a colleague, and took one for herself. She returned her old cellphone back to the first respondent to be used by someone else.

[7] On 27 July 2016, the applicant was served with a notice to attend a disciplinary enquiry to answer to the following charges:

‘Charge 1

Negligently failing to carry out policy and procedure in that you upgrade phones without authorisation.

Charge 2

Loss suffered by company in that extra cost of phone when it was not necessary.

Charge 3

Failing to carry out instruction last week you were informed of all the WAG1 forms needed to be submitted.’

[8] She was found guilty of all the charges and summarily dismissed. Disgruntled by her dismissal, she referred an unfair dismissal dispute to the CCMA. Following a failed conciliation, the matter preceded to arbitration hence the impugned award. The Commissioner found the applicant not guilty of the third charge but confirmed the verdict of guilty on the first and second charges.

Legal principles and application

[9] It is trite that a review of an award issued by a commissioner is permissible if he or she has misconceived the nature of the enquiry or arrived at an unreasonable result.[3] A result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented

to him or her.[4]

[10] Notably, in the present instance, the applicant testified that she was assured by Twin Radio that the new cellphones she had acquired when she upgraded or migrated the contracts would not result in additional costs. In fact, it is apparent from the documentary evidence that the additional charges the first respondent complained about relates to R150.00 which it itemised as administration fee. The said administration fee was only effected several months after the contracts had been upgraded. The applicant was adamant that these additional charges could have been queried with the service provider since they were contrary to what she had been promised. This evidence was not disputed.

[11] There is no evidence to support the Commissioner's conclusion that the applicant dishonestly concealed the fact that the contracts had been upgraded. Conversely, the applicant testified that as soon as she received the new cellphones, which she thought were free gift, she gave Mrs Ndwandwe one and returned her old phone. Nothing turns on the fact that the Vodacom statements were only submitted after the cellphones had been secured.

[12] Furthermore, the applicant testified that she understood the instruction she was given subsequent to a discussion with Mr Ndwandwe to mean that she had to get the best deal for the company when she was migrating the cellphone contracts. Tellingly, Mr Ndwandwe did not testify. Obviously, the applicant's version of what transpired during the meeting where the instruction was issued remained unchallenged. Mrs Ndwandwe, the first respondent's only witness, conceded that she was not privy to those discussions.

[13] Notwithstanding the above, even if the applicant was guilty of negligence or failure to obey Mr Ndwandwe's instruction, the Commissioner failed to address the issue of the appropriateness of the sanction of dismissal. The applicant had been with the first respondent for 12 years with a clean disciplinary record and had been recently promoted. It is also apparent from the common cause facts that the whole saga was a product of miscommunication and with no mala fides on the part of the applicant. There was no evidence that the relationship had been irretrievably damaged. In my view, the Commissioner's decision in upholding the sanction of dismissal is unreasonable.

[14] When it comes to the procedural impugn, the Commissioner's decision is beyond reproach. The fact that the chairperson of the disciplinary enquiry subsequently replaced the applicant cannot support the allegation that he was bias.

Conclusion

- [15] In all the circumstances, the Commissioner evidently misconstrued the nature of the enquiry and failed to address the question raised for determination.[5] Since there was no fair trial of the issues, the outcome was unreasonable. As such, the award falls to be set aside.
- [16] Yet, to remit this matter back to the CCMA would be grievously unjust given the amount of time that has passed since the applicant's dismissal. In the light of the fact that the adequacy of the record of the arbitration proceedings is not disputed, I am in a position to deal with this matter to finality.
- [17] Based on the finding I have arrived above; the dismissal of the applicant was substantively unfair. Since the applicant seeks compensation, I have taken into account the circumstances that led to her dismissal and her length service in the employ of the first respondent. In my view, compensation equal to six months' salary (R40 000.00 x 6 = R240 000.00) is just and equitable.

Costs

- [18] As a rule, this Court is slow in granting costs against the losing party in keeping with the requirements of the law and fairness. In the present case, however, the first respondent was ill-advised in opposing this application. As a result, an individual litigant, has to incur legal costs in order to vindicate her rights. Therefore, a cost order is justifiable.
- [19] I, accordingly, make the following order:

Order

1. The arbitration award under case number GAVL3306-16 and dated 1 February 2017 is reviewed and set aside and substituted with the following order:
 - 1.1. The dismissal of the applicant, Ms Tertia Coetzee, is substantively unfair.
 - 1.2. The first respondent is to pay Ms Tertia Coetzee an amount of Two Hundred and Forty Thousand Rands (R240 000.00) not later than 14 February 2021.
2. The first respondent is to pay Ms Tertia Coetzee's costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr C Boshoff of Corné Boshoff Attorneys

For the first Respondent: None

[1] Act 66 of 1995, as amended.

[2] See: Record of documents, page 33.

[3] SA Rugby Union v Watson and Others(

2019) 40 ILJ 1052 (LAC). At paras 26 and 26; see also Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008

(2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) 2013

(6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA); Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others (2014) 35 ILJ 943 (LAC) at para 21.

[4] Ibid.

[5] See: supra n 3.

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