

SOUTH AFRICA / JUDGMENT

NEHAWU obo Nkosi v Thokoa (JR1650/14) [2023] ZALCJHB 266 (12 September 2023) [2023] ZALCJHB 266

COURT

Labour Court Johannesburg

BEFORE

Sono

CASE / FILE NUMBER

JR1650/14

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case No: JR1650/14

In the matter between:

NEHAWU
obo NGB NKOSI
Applicant
And
S
THOKA
First
Respondent
GENERAL
PUBLIC SERVICE
SECTORAL
BARGAINING COUNCIL
Second
Respondent
DEPARTMENT
OF RURAL DEVELOPMENT
AND
LAND REFORM
Third
Respondent
Heard: 28 June 2023
Delivered: 12

September 2023

JUDGMENT

SONO, AJ

Introduction

- [1] This is an opposed review application in which the Applicant seeks to review and set aside the arbitration award issued by the First Respondent under the auspices of the Second Respondent dated 24 June 2014 (the Award).
- [2] Before dealing with the matter it is apt to set out a brief historical background of the matter.
- [3] The matter came before Mahosi J on 26 May 2020. The matter was struck off the roll due to the fact that the Applicant had failed to file the record of review timeously and in compliance with the Practice Manual[1] and as such the application was deemed withdrawn in terms of clause 11.2.3 and 11.2.7 Practice Manual.
- [4] On 17 February 2022, the matter came before Moshwana J for removal from the archives in terms of clause 11.2.7.
- [5] The matter was accordingly removed from the archives and comes before this court for the hearing of the review application.

Factual background

- [6] The Applicant is the erstwhile employee of the Third Respondent, the Department of Rural Development and Land Reform, previously employed as Assistant Director: Project Coordinator;
- [7] The Applicant was charged with serious charges of misconduct including multiple allegations of corruption, gross dishonesty, fraud and misrepresentation;
- [8] The Applicant was dismissed following a disciplinary hearing wherein he was found guilty on the charges of misconduct. Dissatisfied with the finding of guilt, he referred an unfair dismissal dispute to the Second Respondent, the General Public Service Sectoral Bargaining Council (GPSSBC);
- [9] The First Respondent is the arbitrator appointed to arbitrate the unfair dismissal and he rendered the impugned Award;
- [10] The First Respondent upheld the Applicant's dismissal and found that his dismissal was both substantively and procedurally fair.

Test for review

[11] The review test in applications of this nature is trite. The test is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.[2] This is a test as pronounced by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*. [3] In *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration*, the Labour Appeal Court (LAC), per Zondo JP (as he was then), held that -

‘In my view Sidumo attempts to strike a balance between, two extremes, namely, between, on the one hand, interfering too much or too easily with decisions or arbitration awards of the CCMA and, on the other refraining too much from interfering with the CCMA's awards or decisions... Sidumo does not allow that a CCMA arbitration award or decision be set aside simply because the Court would have arrived at a different decision to that of the commissioner... The Court will need to remind itself that...the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision... is one that a reasonable decision-maker could not reach in all of the circumstances.’[4]

[12] Recently, the LAC, per Sutherland JA, in *Makuleni v Standard Bank of South Africa Ltd and Others*[5] restated the review test -

‘[3] The critical approach to reviews that turn on 'unreasonableness' was articulated by Murphy AJA in *Head of Department of Education v Mofokeng & others* at paras [30] to [33]. The significant passages are emphasized:

[30] 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 (Congress of SA Trade Unions as Amicus Curia)* and this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & 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.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant & considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover,

judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is/subject to scrutiny. As the SCA held in Herholdt, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the

issues.

- [32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LA, confining review to 'defects' as defined in S/145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something, more is required. To repeat flaws in the reasoning of the arbitrator evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.
- [33] 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 enquiry. 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 enquiry, 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 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 fine 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.' (own emphasis added)
- [13] Sutherland JA, went further to give the following instructive words which ring true herein -

‘[4] ... At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only the conclusion is untenable is a review and setting aside warranted.’[6] (own emphasis added)

Grounds of review

[14] The Applicant challenges the Award on the following grounds -

14.1 that the First Respondent exceeded his powers in imposing the sanction of dismissal as no evidence was led to show that there was a breakdown of the trust in the relationship;

14.2 that the First Respondent committed a gross irregularity in that the First Respondent did not consider the Applicant's closing arguments on procedural unfairness;

14.3 that the First Respondent committed a gross irregularity in that the First Respondent did not apply his mind to the fact that the Applicant did not stand to gain from the transaction;

14.4 that the First Respondent committed a gross irregularity in that the First Respondent did not apply his mind and failed to consider the fact that the funds were released due to a request for payment made on 24 February 2012;

14.5 that the First Respondent failed to apply his mind to the fact that the Applicant did not compile the memorandum. According to the Applicant, he was involved in assisting with the proofreading of the submissions. Further, the Applicant was misled which led to the Applicant being satisfied that what was reflected in the memorandum was done and he was not the project manager;

14.6 that the First Respondent committed a gross irregularity in that the Applicant was held accountable for misconduct that he did not commit as he only signed the route form and not the memorandum and that the memorandum was compiled by Grace Mokaka and signed by Mr Mafumadi;

14.7 that the First Respondent committed a gross irregularity in that, contrary to paragraph 33 of the Award, the Applicant never admitted to signing the memorandum; and

14.8 that the First Respondent misunderstood the enquiry. The argument is that the First Respondent failed to take into account the element of intention which according to the Applicant was essential in the allegations levelled against the Applicant.

[15] It is important to point out what this court recently said in relation to arbitration proceedings -

‘[7] In any dismissal, what an employer is obligated to prove is a fair reason for the dismissal it effected. A reason is fair if it is related to the conduct of an employee. Therefore, in an instance where an employee faces a barrage of allegations of misconduct, all an employer is required to do is to prove one of the many allegations that may have been raised which questions the conduct of an employee...’[7] (own emphasis added)

[16] Therefore, all that was required was for the First Respondent to find that one of the 6 serious allegations of misconduct levelled against the Applicant had been proven by the Third Respondent for him to conclude that there was a fair reason for the dismissal.

[17] In his evidence, under oath, the Applicant himself testified that as one of the requisites he had to go and check if the services were rendered on the farm. He went to the farm and found that the work had not been completed. Further, that he assisted in checking and signing the memorandum. On his own version, he signed both the memorandum and the route form therefore his contention that the First Respondent committed a gross irregularity in finding that the Applicant signed the memorandum must fail.

[18] Moreover, the Applicant signed the "route form" as the negotiator/author.[8] Further, it is the Applicant who sent the email confirming that services had been rendered by the service provider for Endlovini Community and Sibiya family and recommended that finance should proceed to pay in circumstances where the work was not done. The Applicant testified that he did this on the back of an "assurance" by Mr Sam Nkosi. The same Mr Sam Nkosi who he elected not to call as a witness. The work was not done and he knew that the work was not done nonetheless the Applicant advised the Third Respondent to make payment to the service provider. In this regard, it is clear that he was in fact guilty of the misconduct levelled against him and the Commissioner was justified in finding that his dismissal was fair. Due to the actions of the Applicant, the Third Respondent proceeded to make payment when no services were rendered and no value for money was received by the Third Respondent. Whether the Applicant stood to gain something is immaterial, the fact is that the Third Respondent was prejudiced by his actions.

[19] The Award is in fact well-reasoned, in line with the prevailing labour law and reflects a conclusion that a reasonable decision maker could reach. In other words, it falls within the band of reasonableness. It cannot be said that the conclusion reached by the First Respondent is untenable or that any errors of fact are material.

[20] The Second Respondent correctly identified the issue he was meant to determine.[9] Furthermore, the Second Respondent correctly drew a negative inference from the Applicant's failure to call Ms Gladys Mokoka and Mr Sam Nkosi who were clearly instrumental to his defence. Save for mere allegations of errors of fact, which are not material to the outcome, the conclusion is not untenable or reflective of a decision that falls outside the bounds of reasonableness.

[21] Turning to the issue of the sanction, the Second Respondent considered the appropriate law in Sidumo and Department of Home Affairs[10] and correctly found that -

‘[h]aving considered the totality of the circumstances of the present case as stated by the Constitutional and Labour Appeal Courts, more especially the seriousness of the transgression, the reason for the imposed sanction and the harm caused by the employee , I find that the sanction of dismissal of [the Applicant] was appropriate.’ (own emphasis added)

[22] This finding cannot be interfered with. It is sound in law and reflects a finding reached judiciously. The Applicant was found guilty of serious charges of misconduct, including multiple counts of dishonesty and misrepresentation. The nature of these offences and a finding of guilt on those charges goes to the heart of the employment relationship and destroys any trust relationship. No evidence was required to be led specifically on the destruction of the trust relationship.[11] The dismissal was appropriate in this case and not a sanction that this court will interfere with.

[23] Finally, one must deal with the allegation that the First Respondent failed to take into account the element of “intention” in deciding the fairness or otherwise of the Applicant's dismissal. This contention must similarly fail. The dispute before the First Respondent was not about civil liability to the extent that he had to interrogate the Applicant's intention. The dispute was concerned with the Applicant's misconduct and whether the Third Respondent had proved, on a balance of probabilities, the essential allegations against the Applicant. This is the nature of labour disputes.

Conclusion

[24] The conclusion reached by the First Respondent falls within the bounds of reasonableness. Any reasonable decision maker would have reached the same conclusion on the facts and circumstances of the matter.

[25] The interest of justice dictates that each party should bear its own costs.

Order

[26] Accordingly, I make the following order:

26.1 The application is dismissed;

26.2 No order as to costs.

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Acting Judge of the Labour Court of South Africa

Appearances

For Applicant:

Mr M Mashiane

Instructed by:

M Matshiyane Attorneys

For the Respondent:

Adv Bothma

State Attorney

- [1] Practice Manual of the Labour Court of South Africa, effective 1 April 2013.
- [2] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] ZACC 22; [2007] 12 BLLR 1097 (CC) at para 110.
- [3] Ibid.
- [4] [2007] ZALAC 12; [2008] 3 BLLR 197 (LAC) at para 99.
- [5] [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC).
- [6] Ibid.
- [7] Bidvest Steiner v Lourens NO and Others [2023] JOL 59375.
- [8] Founding Affidavit - Page 54 of the Pleadings bundle
- [9] Arbitration Award, page 20 at para 5.
- [10] Department of Home Affairs and Another v Ndlovu and Others [2014] ZALAC 11; [2014] 9 BLLR 851 (LAC).
- [11] Autozone v Dispute Resolution Centre of Motor Industry and Others [2019] ZALAC 46; [2019] 6 BLLR 551 (LAC) at para 12 – 13.

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