

SOUTH AFRICA / JUDGMENT

Nkanyani v Thee NO and Others (JR142/2018) [2021] ZALCJHB 59 (21 May 2021) [2021] ZALCJHB 59

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR142/2018

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The Labour Court of
South Africa
(Held at Johannesburg)
Not
reportable
Case
No: JR 142/2018

In the matter between:

MICHELE
KEITUMETSE NKANYANI
Applicant
and
JW
THEE
N.O
First Respondent
COMMISSION FOR
CCONCILIATION
MEDIATION
AND ARBITRATION
Second
Respondent
SBV
SERVICES (PTY)
LTD
Third Respondent
Hearing: 11 May 2021
Date

of judgment: 21 May 2021. Judgment delivered by email.

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the first respondent on 17 December 2017. In his award, the arbitrator found that the applicant's dismissal was procedurally and substantively fair.
- [2] The relevant facts are recorded in the award under review and I do not intend to repeat them here. In brief, the applicant was employed by the third respondent, a provider of cash in transit services, as a human resources manager: support. The applicant was dismissed by the respondent after a disciplinary hearing at which she was charged with gross negligence in that she failed to ensure security checks performed on applicants for employment, and for making an offer to a candidate linked to an incorrect salary scale.
- [3] In his award, the arbitrator acknowledged that there was a factual dispute as to whether the applicant had the third respondent's policy. He recorded that the applicant had denied when giving evidence that she was responsible for any contravention of the policy but that during cross-examination she conceded that she had made a mistake. The arbitrator went on to find:

... in doing so she admitted that she made an offer of employment to Mr Laser without following the respondent's prescribed policy. I am therefore not required to make an analysis and determination of the testimonies of the witnesses.

70. I therefore find the applicant guilty as charged on balance of probabilities on her own admission of guilt
- [4] The arbitrator then went on to consider whether dismissal was an appropriate sanction for a contravention of the rule concerned. He referred to another and noted that he was required to consider all circumstances and uses and sense of fairness and justice to come to a decision. In relation to the applicant's challenge of consistency, the arbitrator held (correctly) that consistency is simply an element of fairness and that every case must be judged on its own merits. He noted that the applicant had not called any witnesses to corroborate her version and that any evidence in relation to inconsistency was hearsay version put by the applicant that amounted to no more than an assumption. The applicant's evidence had been that she had been told by one Rachel that Linda Balfour, the regional manager who testified for the third respondent, had acted wrongly but was not disciplined. In any event, the applicant had not brought the incident on which she relied to the attention of the third respondent's management and had raised the issue of inconsistency only after her dismissal. The arbitrator

found given the insufficiency of the evidence to support any charge of inconsistency, that the third respondent had not acted inconsistently in regard to the application of workplace discipline.

- [5] In relation to the appropriateness of the sanction, the arbitrator took into account that the applicant had committed an act of serious misconduct, that she held a management position and was a custodian of the respondent's policy. The applicant had accepted no responsibility for her actions nor had she shown any remorse, but shifted blame onto others. The arbitrator concluded that in the circumstances the applicant had not demonstrated that she could be trusted by the third respondent and that progressive disciplinary measures would not remedy the problem. In these circumstances, the arbitrator held that the sanction of dismissal was appropriate and fair.
- [6] The record is incomplete, and has made the task of undertaking a review of the arbitrator's findings considerably more difficult. This in itself is a basis on which to dismiss the application. I have had regard where necessary to the arbitrator's recordal of the evidence in the award, and the reconstructed notes to the extent that they are intelligible.
- [7] The applicant's grounds for review are broadly expressed, and lack specificity. The applicant contends that the arbitrator committed a gross irregularity in respect of the manner in which he determined the issues, that he acted unreasonably, that he considered irrelevant issues and excluded relevant issues, that his conclusion on the facts was not reasonable, that he failed properly to apply his mind, that he misconceived the nature of the enquiry and thus arrived at an unreasonable result, that he ignored the applicant's testimony and created the impression that she had changed her version, that he ignored the fact that the third respondent's witnesses conceded inconsistency, and that the arbitrator mentioned

issues which are unnecessary and irrelevant. In the supplementary affidavit, they applicant simply repeats the same grounds, with some elaboration by reference to the record.

- [8] At the hearing of the application, the applicant's counsel proffered two primary submissions. The first is that the applicant did not breach the policy on fingerprinting that was in place at the relevant time; the second was that in any event, the third respondent acted inconsistently in the application of discipline. As I understood the submission, the arbitrator's findings to the contrary where the consequence of a failure to have proper regard to the evidence before him.
- [9] The test to be applied in the present instance is well-established. This court may intervene if and only if the applicant establishes that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could come to it. A right of review has been clearly distinguished from a right of appeal. This court is not empowered to intervene simply because it would have come to a different conclusion on the same facts. 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)). The Labour Appeal Court has affirmed this principle and held that while the failure of an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the 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 (see *Head of Dept. of Education v Mofokeng*)
- [2015] 1 BLLR 50 (LAC), at paragraph 30). In other words, while a failure properly to assess the evidence is indicative of an unreasonable outcome, 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.
- [10] It was not in dispute that in relation to Lesar's recruitment in particular, the applicant had made the offer of employment on 9 November 2016, prior to obtaining his fingerprints. On 12 December 2016, Lesar commenced employment with the third respondent. The applicant only scanned Lesar's fingerprints on 22 December 2016, over a month after the applicant had issued an offer of employment and after Lesar had in fact commenced employment with the third respondent. In her evidence, the applicant's case was that she was not responsible for obtaining Lesar's fingerprints, and that the third respondent had acted inconsistently in applying discipline, in that Balfour had recruited Lebo Nkuna without any checks being done, and that Balfour herself had been recruited without proper vetting.
- [11] The applicant testified that she had ensured that security checks were performed in accordance with the applicable policy, and that she had been in contact with one Andre Ludick from the vetting department. Ludick had sent her an email stating that he wanted the fingerprinting results. The applicant testified that she was surprised to receive the email, since she had expected him to do the fingerprint capturing. The policy on vetting was undergoing revision at the time, but at the time she recruited Lesar, the applicant stated that she acted in accordance with the policy that applied. Further, the offer of employment made to Lesar was subject to a suspensive condition to the effect that he attains credit and criminal clearances.
- [12] Shelley Sinclair testified that in relation to Balfour's employment, the fingerprint advice was unavailable and that in the circumstances, an addendum was attached to Balfour's contract of employment that required her to undergo the fingerprint scan during the first month of employment. Balfour's evidence was to the effect that the recruitment and selection procedure envisaged the placement of an advertisement, shortlisting and invitations to shortlisted candidates for interview. Once a successful candidate had been identified, he or she would be subjected to an internal vetting process to determine in particular, whether the candidate had a criminal record or a bad credit profile. At the conclusion of the verification process, the successful candidate would be offered employment. It has always been the

policy that the human resources department capture fingerprints and request security checks to be done. Balfour testified that the applicant did not discharge this responsibility, and that Lesar had been offered employment without vetting. Balfour's testimony was that the applicant was privy to what was happening in relation to the change in policy on vetting, and that she was aware that vetting had become the responsibility of the human resources department. She gave evidence that training had been given to employees in the human resources department (including the applicant) on the use of the machines that were used to take fingerprints. The applicant had made an offer of employment without prior vetting, and thus placed the third respondent's business at risk. Balfour, Sinclair, and Geldenhuys gave evidence of the lack of trust in the applicant

- [13] The arbitrator was acutely aware of the nature of the dispute before him and the test to be applied. The basis for his conclusion that the third respondent had not acted inconsistently was that the applicant had been unable to tender any direct evidence to this effect. The evidence proffered in support of the contention that the third respondent had acted inconsistently in applying discipline was limited to a statement to the effect that she had 'heard from Rachel' that Balfour had appointed Nkuna without following the vetting process. The arbitrator's rejection of the applicant's contentions in this regard was entirely justified.
- [14] Insofar as the substantive charge against the applicant was concerned, the arbitrator was clearly aware that there was a factual dispute about whether the applicant had contravened the applicable policy. The evidence for the third respondent, proffered through four witnesses, was that the applicant was aware of the applicable policy, had been trained and had indeed contravened the policy by making an offer of employment without vetting. Insofar as the applicant's evidence was concerned, the arbitrator found that the applicant during cross-examination had made a concession that was fatal to her case. A review court is loath to question an arbitrator's findings on credibility. The arbitrator's award reflects his

conclusion

that the third respondent's witnesses were more credible, and that the third respondent's version that the applicant was responsible for carrying out fingerprint checks was the more probable. I fail to appreciate how in these circumstances it can

be said that the arbitrator committed any reviewable irregularity. The arbitrator considered the evidence, as he was obliged to do, and made a ruling in accordance with the relevant authorities.

- [15] It is not necessary for the court to apply the second stage of the review test concerned (i.e. whether notwithstanding any reviewable irregularity on the part of the arbitrator the result nonetheless falls within a band of decisions to which reasonable decision-makers could come) given the finding that the arbitrator, in his assessment of the evidence, committed no reviewable irregularities. Put another way, the applicant has not established any 'defect' for the purposes of section 145. The application thus stands to be dismissed.

[16] Finally, in so far as costs are concerned, the provisions of section 162 of the LRA forward the court a broad discretion to make orders for costs according to the requirements of the law and fairness. This court ordinarily is reluctant to make orders for costs against employees who pursue grievances against their employers in good faith. I will accept that the present application was not instituted on a frivolous or vexatious basis, and it seems to me that the general rule should be applied.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv C Grant, instructed by De Beer Makoele Inc.

For the third respondent: Adv P Maharaj-Pillay, instructed by Webber Wentzel

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Prepared on 24 October 2026 · Esheria