

SOUTH AFRICA / JUDGMENT

Pelchem SOC Ltd v Ncube and Others (JR362/2019) [2021]

ZALCJHB 391 (21 October 2021)

[2021] ZALCJHB 391

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR362/2019

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THE
LABOUR COURT OF SOUTH AFRICA
(HELD
AT JOHANNESBURG)
Not
reportable
CASE
NO: JR 362/2019
In

the matter between:

PELCHEM
SOC
LTD Applicant
and
JOSAI
NCUBE First
Respondent
CCMA Second
Respondent
MOHAU
NTAOPANE
N.O. Third
respondent
Date of hearing: 20
October 2021 (via Zoom)

Date of judgment:

21 October 2021

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks to review and set aside an arbitration award issued by the third respondent (the arbitrator) on 7 February 2019. In his award, the arbitrator found that the dismissal of the first respondent by the applicant was substantively and procedurally unfair. The arbitrator ordered the applicant to reinstate the first respondent, with back pay.
- [2] The first respondent was employed by the applicant on 1 March 2018 as a manager: financial accounting, subject to a probationary period of three months. Shortly prior to the expiry of the three-month period, on 18 May 2018, the first respondent was advised that the applicant would not be confirming his permanent appointment. The first respondent contested the fairness of his dismissal and referred the matter to arbitration, where the arbitrator ruled on the terms reflected above.
- [3] The arbitrator's award summarises the evidence by the applicant's chief financial officer, the applicants only witness, and also the evidence by the first respondent, who testified on his own behalf. The arbitrator's reasoning is apparent from the following paragraphs:
- [35] ... this is a unique case that cannot be equated with the situation where in my view the employee is aware of exactly what they are getting themselves into. For instance, the respondent's witness admitted in cross examination that having only been appointed in January 2018, they had been no CFA in the preceding year. They had also been no financial manager for the three months preceding the applicant's appointment. There was also a concession that financial reporting had not properly been done throughout the year and Mr Mosotho conceded that it would be difficult to draft the annual financial statements under these circumstances...
- [37] I am willing, however, to recognize that this might be a case of the applicant having been set up to fail. I do not believe that the applicant presented himself to be such a problem solver that he can do the impossible, no matter how much the respondent attempted to downplay the significance of the obstacles here. Test many of the applicant that the first consultant presented figures that did not tally with the asset register was not disputed by the respondent, and although it had been claimed time and again that the consultants completed the work, no evidence was presented as to how they were able to produce sound financial statements after the departure of the applicant. There were a number of concessions made by the respondent's witness that do not support the arguments advanced. For instance, Mr Mosotho indicated that in a handover meeting the applicant would have been able to acquaint himself with the Solomon system. The applicant himself testified that every organisation has its own unique way of doing things and this was not disputed. So how can it be said that not having been handed the ropes was something the applicant was simply expected to overcome? Particularly in the short space of time he was allocated.

- [4] It had been submitted during the arbitration hearing that the applicant was a senior employee and that as such, he ought to have been aware that he was failing to meet the required performance standard. Much was made of the arbitrator's treatment of *Somyo v Ross Poultry Breeders (Pty) Ltd* [1997] 7 BLLR 862 (LAC), where the LAC made a decision to this effect. Contrary to what the applicant submits, the arbitrator did not disregard this authority – he recorded that that case did not concern a probationary employee, and that in any event, the employee concerned possessed the advantage of a wealth of experience within the organisation. That factor is simply not present in this case; indeed, the very case put up by the first respondent was that he had no knowledge or experience within the organisation and that he could not reasonably be expected to meet the applicant's expectations in these circumstances.
- [5] The applicant submits that the arbitrator misconceived the nature of the enquiry before him, or misconceived his duties in connection with the enquiry that served before him, thereby arriving at an unreasonable result. Further, the applicant submits that the arbitrator failed to consider material evidence that was placed before him, alternatively, considered irrelevant material, with the same consequence. In particular, the applicant submits that the arbitrator failed to comprehend that he was required to consider whether the first respondent had failed to meet a required performance standard, and that had he done so, he would have found, on the evidence before him, that the first respondent had indeed failed to meet the performance standard of which he could reasonably be expected to have been aware. Further, the applicant submits that the first respondent would have found, on the evidence, that the first respondent had been given a fair opportunity to meet the required performance standard and that

dismissal was an appropriate sanction in the circumstances.

- [6] The test to be applied 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. In a matter such as the present, where the applicant relies on what are contended to be reviewable irregularities in the assessment of the evidence, the court must be cautious to ensure that the line between an appeal and a review is not crossed. In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2007] ZALC 66; [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 or 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 judgment). Specifically, the questions for a review court to ask or 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 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). In short, when an 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).

- [7] I deal first with the arbitrator's finding on procedural fairness. The arbitrator held that the first respondent's dismissal was procedurally unfair in circumstances where the undisputed evidence was that he was called to a meeting on 18 May 2018 and presented with a letter which suggested that he (the first respondent) was told that his probation period would not be renewed at the end of the month on account of his poor performance, that he was to surrender his laptop and login passwords and credentials and that he should not report for work pending the expiry of his contract on 31 May 2018. The arbitrator dismissed the applicant's submissions that the meeting fulfilled the requirement of a fair procedure, particularly given the fact that the first respondent was handed a pre-prepared letter of dismissal when called to the meeting, without any notice as to the agenda. Contrary to the code, the first respondent was not afforded an opportunity to make any representations prior to his dismissal. The decision to dismiss him had obviously been taken prior to the meeting on 18 May 2018. At the hearing of the present application, the applicant's representative conceded (correctly) that the arbitrator's finding in respect of procedural fairness was not reviewable.
- [8] In so far as substantive fairness is concerned, there is no doubt that the arbitrator appreciated the nature of the dispute before him, and that he had clear regard to the issues that he was required to decide. He dealt with the substantial merits of the dispute and came to a considered decision on the evidence before him. In essence, the applicant's case in the present proceedings is that the arbitrator misdirected himself in that he failed to make any substantive finding, as contemplated by item 9 of the Code of Good Practice, as to whether or not the first respondent failed to meet the required performance standard. Had the arbitrator embarked on this enquiry, so the submission went, the arbitrator would have found, on the evidence before him, that the first respondent had failed to meet a performance standard. That being so, the arbitrator would then have been in a proper position to assess whether the first respondent was aware of the required performance standard, whether he was given a fair opportunity to meet the required performance standard and whether dismissal was an appropriate sanction for not meeting the required performance standard. Put another way, the applicant contends that having failed to embark on the first critical enquiry into whether the first respondent had to meet the required performance standards, he could not have embarked on the consequential enquiries in the manner in which the code of practice enjoined him to do.

- [9] In my view, there is no merit in this submission. While it is correct that the arbitrator was required to consider whether the first respondent had failed to meet a performance standard, given the facts before him, it was not necessary for him to engage in any detail with the applicant's evidence that the first respondent was unable to create the necessary case file on his computer and had to be told to contact case with for support, that he was unable to produce a trial balance which tallied with the previous year's figures without input and assistance from the chief financial officer, that he had neglected to request the necessary statements and invoices from the applicant's largest supplier, that he failed to provide the CFO with the face of the relevant balance sheet's in order to ascertain whether the figures tallied correctly, that he was unable to produce accurate financial statements, despite the deadline having elapsed, and that he was unable to clear and reconcile differences in notes to the annual financial statements. None of these shortcomings were disputed.
- [10] In other words, the primary nature of the enquiry before the arbitrator was primarily one into the requirements of item 9 (b) of the Code and in particular, whether the first respondent was given a fair opportunity to meet the required performance standard. The arbitrator undertook this enquiry, and his ultimate conclusion was that the applicant had failed to afford the first respondent the degree of support that he could reasonably have expected during the course of his probation. This was particularly so in the circumstances that prevailed at the time of the first respondent's appointment. It was not disputed that the first respondent had been appointed in the month of the financial year end in circumstances where the position had been vacant for some months, without any handover meeting. It was also not disputed that information given to the first respondent was incorrect, supply invoices were long outstanding and had to be accrued after the financial year end, and that no monthly reconciliations had been done. As counsel for the first respondent put it, an accountant is as good as the information furnished to him or her. There is no clear evidence of the assistance afforded to the first respondent to discharge his functions. There is no cogent evidence as to any guidance, counselling or assessment afforded to the first respondent.
- [11] In short, the record of the proceedings under review does not disclose that the arbitrator committed any material misdirections either in his conduct of the proceedings or his assessment of the evidence, and his decision falls within a band of decisions to which a reasonable decision-maker could come on that evidence. That being so, the application stands to be dismissed.
- [12] Insofar as costs are concerned, the first respondent is an individual employee who has been required to fund his opposition to the application for review. There is no cogent reason why he should be denied his costs.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Mr I Gwaunza, ENS Africa Inc.

For the First respondent: Adv AC Diamond, instructed by JW Wessels & Partners Inc.

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