
SOUTH AFRICA / JUDGMENT

Utility Administration Services (Pty) Ltd v Van den Heever and Others (JR1498/16) [2017] ZALCJHB 253 (21 June 2017) [2017] ZALCJHB 253

COURT

Labour Court Johannesburg

BEFORE

H Molotsi

CASE / FILE NUMBER

JR1498/16

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JR 1498/16

In the matter between:

UTILITY ADMINISTRATION SERVICES Applicant

(PTY) LTD

And

MICHELLE VAN DEN HEEVER First Respondent

THE COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION Second Respondent

J MATHEBULA N.O. Third Respondent

Heard: 17 January 2017

Delivered: 21 June 2017

MOLOTSI, AJ

Introduction

- [1] This matter concerns an application by the applicant to review and set aside an arbitration award by the third respondent in his capacity as an arbitrator of the second respondent, the Commission for Conciliation Mediation and Arbitration ('CCMA'). This application has been brought in terms of section 145 of the Labour Relations Act[1]. The third respondent issued an arbitration award on 17 June 2016 ordering the applicant to pay the first respondent three months compensation amounting to R81 000.00.
- [2] The first respondent was employed by the applicant as a utility manager and her employment commenced on 7 September 2015. She was employed on a probationary period of six months and was dismissed on 15 February 2016. She challenged her dismissal and referred an unfair dismissal dispute to the CCMA on 9 March 2016. The CCMA set down the matter for Con/Arb hearing on 6 April 2016. The applicant objected to the Con/Arb process taking place on 6 April 2016. Conciliation took place on 6 April 2016 and the dispute could not be resolved.
- [3] The first respondent then requested the dispute to be resolved by means of arbitration. The request for arbitration was filed with the CCMA on 7 April 2016. The arbitration hearing took place before the third respondent on 6 June 2016.

The relevant background

- [4] The nature of the applicant's business is to distribute utility bills for their clients. The clients will then deliver the utility bills to their tenants. The business is operating on meeting client's deadlines and targets and for all in turns and purposes a pressured work environment. The utility bills had to be delivered to the clients of the applicant within a specific period.
- [5] The first respondent, as a manager, was responsible for managing staff and staff output. The first respondent working hours were from 08h00 to 16h30 Monday to Friday. It appears that in the beginning the first respondent worked long hours until the early hours of the morning and was rewarded with a merit performance bonus in December 2015.
- [6] The applicant had two meetings with the first respondent to discuss her performance. The meetings took place on 9 and 15 February 2016 respectively. The minutes of the meeting were submitted during the arbitration hearing. The applicant was not happy with the first respondent's performance as she was failing to meet the targets. The first respondent blamed the new system which had

teething problems as a reason why she could not meet the targets.

- [7] During the arbitration hearing the applicant contended that the meetings were aimed at assisting the first respondent with her

performance. The first respondent on the other hand contended that she was not offered any assistance, training and that all her

suggestions to improve the operations were turned down by the applicant. It was after the meeting of the 15 February 2016 when the applicant decided to immediately dismiss the first respondent. The reasons for the first respondent's dismissal are indicated in the dismissal letter as follows:

“ Notice during probationary period

We herewith give formal notice of termination of your probation contract. Your last working day will be today 15 February 2016. The reason for termination is the unsuccessful completion of your probationary period.

Issues raised during formal discussions held with HR, see minutes attached; constitutes your wilful and deliberate behaviour is inconsistent with the continuation of your contract of employment. Your actions constitute serious misconduct warranting summary dismissal.

You will be paid any accrued entitlements and outstanding remuneration up to and including the date of this letter including 1 weeks 'notice pay.

It is always regrettable to have to end employment, but it is felt that this would be in the best interest of both yourself and the Company.”

The test for review

[8] The review test is now settled law. In *Sidumo and Another v Rustenburg Platinum Mines Ltd & Others*[2] Navsa AJ held that the standard as contemplated by section 33 of the Constitution[3] are in essence to be blended into the review in Section 145(2) of the LRA. A reviewing Court must decide if the decision of the Commissioner is a reasonable decision. In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[4] the Court held that:

“The Constitutional Court has decided in Sidumo that the grounds of review set out in s 145 are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.”

[9] In *Herholdt v Nedbank Ltd and Another*[5] held that:

“In summary the position regarding the review of CCMA award is this: A review of CCMA award is permissible if defect in the proceedings fall within one of the grounds in s 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.

- [10] Another important judgement settling the test for review is Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others[6] the court held that:

“Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator...In other words, in a case such as the present, where gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available materials.”

- [11] In Police and Prisons Civil Rights Union obo Sandile lunga Biyela and the Safety and Security Sectoral Bargaining Council, Ledwaba, South African Police Service[7] the court held that:

“Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds. This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.

- [12] In Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others[8] the Court held that:

“the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.”

Grounds of review

- [13] The applicant's case for review as foreshadowed in the founding affidavit is based on three grounds:

13.1. The first ground relates to the third respondent finding that no procedure was followed in effecting the termination of the first respondent. The applicant contends in the founding affidavit that the meetings of the 9 and 15 February 2016 respectively served the purpose of conveying to the first respondent the concerns of the applicant and further solicited the representations of the first respondent. The applicant concludes this ground of review by stating that the third respondent failure to consider the substance or at all, the nature, purpose and substance of the meeting of 15 February 2016 and consequently whether or not the process followed by the applicant constituted an extension of the opportunity to make representations as envisaged by the Code of Good Practice. The applicant believed that the third respondent's arbitration award is reviewable on the basis that the third respondent committed a material error of fact and/or law.

13.2 The second ground of review is that the third respondent failed to deal with the substantial merits of the dispute in compliance with the imperatives set out in section 138(1) of the LRA. This related to the third respondent conclusion that the first respondent was dismissed for multiple reasons. In respect of performance as a reason for dismissal, the third respondent failed to deal with any of the reasons pertaining to such performance, in particular to those relating to the first respondent's conduct of leaving the workplace earlier than her subordinates who had to complete the scheduled tasks. The third respondent failed to attach any

significance to the first respondent's acknowledgement that the essential relationship had broken down.

The applicant elaborates this ground of review by stating that where the first respondent's performance constitutes at least part or one of the reasons of the reasons for termination of employment, the applicant was entitled to terminate for reasons which would ordinarily be less compelling. Put differently, it is the very purpose of a probationary period to determine suitability of the employee employment. The first respondent had expressed no inclination to pursue continued employment with the Applicant and expressed the intent to leave at the end of the current month (February 2016). There was a mutual acceptance that the employment relationship could not continue.

13.3 The third ground for review is that the award of compensation of three months was substantially unreasonable.

Evaluation

[14] The applicant's first ground relates to the finding of the third respondent that the applicant failed to follow any procedure.

As stated above the review Court must consider the whole material before the arbitrator to come to the conclusion whether the decision

of the arbitrator is one which a reasonable decision maker could make. The first respondent's dismissal letter indeed reveals a number of reasons for the dismissal. The letter of dismissal reveals that the first respondent was dismissed for unsuccessful completion of the probation period. The other reason is about the conduct of the first respondent which constituted serious misconduct. The first respondent's dismissal was therefore related to her probation and acts of misconduct.

[15] The first respondent probation was for a period of six months. At the time of dismissal the first respondent had not completed her probation period. Item 8 of schedule 8 of the Code of Good Practice ('the Code') deals with probation. Item 8 (e) – (h) provides that:

"(e) During the probation period, the employee's performance should be assessed. An employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service."

- (f) If the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet the required standard. If the employer believes that the employee is incompetent, the employer should advise the employee of the respects in which the employee is not competent
- (h) An employer may only decide to dismiss an employee or extend the probation period after the employer has invited the employee to make representations and has considered any representations made.
- [16] The applicant contends that the meetings of 9 and 15 February 2016 constituted representations on the part of the first respondent. I cannot agree with this submission. On a proper analysis of the meetings of 9 February and 15 February 2016 respectively, the purpose of the meetings was to ascertain why the first respondent was not meeting the targets. The first respondent responded by indicating that the system is a problem. The meeting of the 9 February 2016 also dealt with the fact that the first respondent left at 16h30 on the 8 February 2016 whereas her subordinates were left behind to do her work. Both meetings dealt with the fact that the applicant is allowing its employees to work until the early hours of the morning which was something that the first respondent objected too. The meeting of 15 February 2016 further dealt with the fact that the first respondent was allegedly negatively influencing staff and talking badly about the applicant to its client.
- [17] These meetings did not deal at all with representations. The meaning of representations as per item 8(h) of schedule 8 the Code, means that before a decision to dismiss the employee is taken, the employer must hear the employee's side of the story. The employer must ask the employee why shouldn't the employee be dismissed or why should the probation be extended. This is in compliance with the audi alteram partem rule. The evidence before the third respondent shows that the first respondent was not asked to make representations why she must not be dismissed. The fact that the first respondent indicated that she was going to leave at the end of the month, did not absolved the applicant from complying with the Audi principles. The first respondent was not given a reasonable time to meet her targets. From the 9 – 15 February 2016 is a short period of time to determine if the first respondent's performance had improved. There was no further assessment of the applicant's performance from 9 - 15 February 2016. It appears that the applicant was only concerned about the first respondent's conduct in negatively influencing the staff. There was accordingly no valid reason to dismiss the first respondent.
- [18] The fact that the applicant considered the first respondent's conduct as a serious misconduct warranted the applicant to consider putting the allegations against the first respondent and for the first respondent to have opportunity to respond to such allegations. Item 4 of schedule 8 of the Code is relevant. This was not done by the applicant. There was never any attempt by the applicant to comply with item 4 of schedule 8 of the Code. The record of the arbitration proceedings show that the HR manager of the applicant, Ms Bekker, considered the conduct of the applicant as misconduct. Ms Bekker considered the applicant's failure to

meet targets as negligence. A disciplinary enquiry was necessary. The Applicant cannot dismiss the first respondent based on misconduct without following any procedures. The first ground of review must therefore fail.

- [19] The second ground of review must also fail. There is no basis to come to the conclusion that the third respondent failed to deal with substantial merits of the dispute. The third respondent dealt with the issues before him. He compared the evidence of both parties and accepted the version of the first respondent. The third respondent is obliged to deal with substantive merits of the dispute with less legal formalities. The third respondent considered the evidence and arrived at a reasonable conclusion. The third respondent considered item 8 of schedule 8. Although the third respondent did not refer to the meetings of 9 and 15 February 2016, it cannot be said failure to refer to the meetings meant that the third respondent did not apply his mind to the facts or misconstrued the nature of the enquiry.
- [20] The third ground of review must also fail. Looking at the manner of the dismissal of the first respondent in that the first respondent was dismissed without compliance with the audi principle, that there was no compelling reason to end the first respondent's probation in that the applicant did not comply with item 8 (e) of schedule 8. Therefore compensation of three months' salary was reasonable.

Conclusion

- [21] Based on the above reasons, the third respondent award is not reviewable. Given the totality of evidence before the third respondent, the third respondent arrived at a reasonable decision. The award is within the bands of reasonableness.
- [22] The application was not opposed. The issue of costs does not arise.

Order

In the premises, I make the following order:

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

H Molotsi

Acting Judge of the Labour Court

Appearances:

For the Applicant: RJ Maddern of Wright Rose Innes.

For the Respondent: Self

- [1] Act 66 of 1995 as amended
- [2] 2007 12 BLLR 1097 (CC)
- [3] Constitution of the Republic of South Africa, 1996
- [4] 2008 29 ILJ 964 (LAC) at para 96
- [5] 2013 11 BLLR 1074 (SCA)
- [6]
- [2007] ZALC 66; 2014 1 BLLR 20 (LAC)
- [7] Case No JR 2560/14 at para 29 Labour Court Judgement
- [8] 2015 36 ILJ 1453 (LAC) at para 12
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Prepared on 11 October 2026 · Esheria