



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no. JR 1848/2012

In the matter between:

CASH PAYMASTER SERVICES (NORTHERN)(PTY) LTD

Applicant

and

COMMISSIONER JOSIAS SELLO MAAKE N.O.

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

VIVIAN TSJETESO NTLHEKOA

Third Respondent

Heard: 09 July 2014

Delivered: 29 June 2017

Summary: Application in terms of section 145 of the Labour Relations Act, No. 66 of 1995. Commission for Conciliation, Mediation and Arbitration – arbitration award – review – Commissioner ruling dismissal unfair after finding that employer had background.

JUDGMENT

WOODHOUSE, AJ

Introduction

- [1] On 21 October 2016, my Judgment in this matter was handed down by Gush J. The Judgment which was handed down was handed down in error and in circumstances where there was reference to issues and matters which had nothing to do with this matter and should not have formed part of the Judgment at all.
- [2] This error was common to all the parties and myself. As a consequence thereof, on 6 March 2017, I met with the parties in Chambers and confirmed with them that the Judgment had been handed down in error and it was agreed that I would rescind it and provide them with the correct Judgment, which I had already provided to the Registrar.
- [3] In terms of Rule 16A of the Labour Court Rules, this Court is clothed with the power to rescind or vary any Order or Judgment in circumstances, including:

- “i In which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission; or*
- ii granted as a result of a mistake, to both parties.”¹*

- [4] In light of the above, the Judgment and Orders handed down on 21 October 2016 are rescinded and set aside and replaced with the Judgment and Orders set out hereunder.

Background

- [5] This is an application in terms of section 145 of the Labour Relations Act, No. 66 of 1995 (“the Act”).

¹ Rule 16A1(a) (ii) and (iii).

- [6] The Applicant was awarded the contract for the paying of pensions and social grants by the Government.
- [7] The Third Respondent ("Ntlhekoa") was employed as an operator.
- [8] Ntlhekoa was charged with a number of offenses including dishonesty, sabotage, negligently and/or knowingly failing to comply with policies and procedures and causing the Applicant to suffer damage or loss.
- [9] She attended a disciplinary enquiry and was found guilty and dismissed on 25 November 2010.²
- [10] Ntlhekoa referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the Second Respondent"). The dispute was not settled at conciliation and was arbitrated. The arbitration took place on 30 August 2011 and 6 June 2012.
- [11] The Second Respondent found that Ntlhekoa's dismissal was substantively unfair and awarded her an amount of six months' remuneration.
- [12] The Commissioner at arbitration found that Ntlhekoa was guilty of the complaint of negligence.
- [13] The Commissioner found that the sanction of dismissal was too harsh and that Ntlhekoa was entitled to six months' remuneration as compensation.

The Applicant's version

- [14] Ntlhekoa was found guilty of

"1 dishonesty in that you removed and/or assisted in the removal of tally rolls for payment work station A of the Mutale Payment Team for payment on 8 November 2010;

² Page 108 of the record.

- 2 *sabotaging that you deliberately removed and/or assisted in removal of the tally rolls for payment work station A of the Mutale Payment Team for payments made on 8 November 2010;*
- 3 *negligently and/or knowingly failing to carry out policies and procedures in that you failed to adhere to, inter alia, tally roll control policies and procedures when you neglected to ensure that the Company tally rolls were secured at all times;*
- 4 *damage or loss suffered in that the Company suffered a loss of tally rolls and a number of staff were required to work overtime whilst attempting to recover the missing tally rolls;*
- 5 *bringing the Company's name into disrepute with SASSA."*

[15] These complaints for which Ntlhekoa was found guilty, arose out of, in essence, her failure to challenge or deal with what were allegedly serious irregularities occasioned by her Branch Manager.

[16] The Branch Manager and another senior employee were also dismissed as part of this incident which resulted in the tally rolls disappearing and/or not being accounted for and locked in a storeroom.

[17] Ntlhekoa had been in control of the relevant tally roll, and allegedly placed it in the storeroom but had not ensured that the storeroom was locked.

[18] She had failed a polygraph test regarding her actions on this specific day.

[19] She was aware of the rule that the storeroom should have been locked once she had secured the tally rolls in it. Her failure to report that it was unlocked amounted to a breach of the rule.

[20] There had been grievances lodged against the Branch Manager including by Ntlhekoa. He was under the impression that his subordinates were trying to get rid of him.

[21] The Manager, Supervisor and Ntlhekoa all testified during their own enquiries that the storeroom had been unlocked and the tally rolls had been placed in an envelope in it.

- [22] There had been problems with the locking of the storeroom previously.
- [23] The Branch Manager was responsible for the safe keeping of the storeroom keys and for ensuring that the storeroom was locked.
- [24] The Applicant had suffered a financial loss in the form of overtime spent on staff looking for the missing tally roll. It had also suffered a loss in the form of data which had gone missing. The Applicant, however, was unable to establish whether any money had been stolen.
- [25] In terms of the requirements of SASSA and the Applicant's policies and procedures for the storing of tally reports is concerned, the following is provided for:

"Tally rolls are to be stored in envelopes, one envelope for each payment team for day of payment;

The envelopes must have the details of the payment district and the date entered thereon, envelope stop. Envelopes have to be stored monthly on date order and stored in a secure cupboard under locked control.

(Clause 29.3.2 of the policy)

- [26] Ntlhekoa was afforded a polygraph test which she failed on two of the three relevant questions. The two questions related to whether she was aware of who removed or destroyed the tally rolls for payment work station A of the Mutale Payment Team for 8 November 2010.
- [27] Ntlhekoa's case was that:
- 27.1 she disputed that she was guilty of the complaints lodged against her;
- 27.2 she had placed the tally rolls in an envelope and put them in the storeroom. The storeroom was unlocked. The Branch Manager was responsible for ensuring that the storeroom was always locked;
- 27.3 she disputed lying to Lizette Snyman, who carried out the polygraph test.

The Commissioner's findings

[28] The Commissioner found that:

- 28.1 the complaints lodged against Ntlhekoa amounted to a splitting or duplication of charges and ultimately convictions by the disciplinary enquiry chairperson on these charges;
- 28.2 on three of the four charges, he found that there was no evidence to find Ntlhekoa guilty of these (charges 1, 2 and 4 in paragraph 7 above). The only complaint which Ntlhekoa was guilty of was negligence (charge 3 paragraph 4 above);
- 28.3 the disciplinary enquiry chairperson's conduct in finding Ntlhekoa guilty of charges 1, 2 and 4 required direct evidence. The Applicant was only able to tender circumstantial evidence which was not sufficient and unsatisfactory;
- 28.4 the evidence of the polygraph test was not suitably corroborative of any other evidence led;
- 28.5 Ntlhekoa was guilty of negligence and not gross negligence. Had she been charged with gross negligence, that may have resulted in the sanction of dismissal in terms of the Applicant's Disciplinary Code and Procedure;
- 28.6 Ntlhekoa was entitled to six month's compensation or a period the equivalent of the balance of her contract, whichever was the greater, in terms of the pre-arbitration minute signed by the parties.

The Applicant's grounds of review

[29] The Applicant's grounds of review are that:

- 29.1 the Commissioner misdirected himself or alternatively reached a number of unreasonable conclusions namely that –

- 29.1.1 he erred in focusing on the fact that Ntlhekoa was a first offender and not on the seriousness of the offence which warranted dismissal. In addition to this, the Applicant complains that the only issue which the Commissioner had to decide was whether Ntlhekoa was guilty of the offence or not;
- 29.1.2 he failed to properly attach significant weight to the outcome of the polygraph test;
- 29.1.3 as a consequence of the above, the Commissioner had misapplied his mind, or reached an unreasonable conclusion or exceeded his powers or committed a gross irregularity in the conduct of the proceedings.

[30] In the Applicant's Heads of Argument, the Applicant argued that the Commissioner also misconducted himself by failing to take into account the circumstantial evidence led by the Applicant's witnesses. This ground was not clearly pleaded at all.

The test on review

[31] Arbitration awards issued by commissioners of the CCMA and arbitrators of various bargaining councils are reviewable in terms, *inter alia*, of section 145 of the Labour Relations Act, 66 of 1995 ("the LRA") on any of the specific grounds set out therein. These grounds are:

- 31.1 where the Commissioner commits misconduct in relation to his duties as an arbitrator;
- 31.2 where the Commissioner commits gross irregularities in the conduct of the arbitration proceedings;
- 31.3 where the Commissioner acts out of his powers as an arbitrator, or where the Commissioner's ruling/award was improperly obtained.

[32] The test to be applied by this Court in deciding on the reviewability or otherwise of an arbitration award has been settled by the Constitutional Court in *Sidumo*

and Another v Rustenburg Platinum Mines Ltd and Others [2007] 12 BLLR 1097 (CC). This test is based on the Constitutional standard of reasonableness which, as the Constitutional Court held in *Sidumo*, now suffuses the grounds of review set out in section 145 of the LRA précised above.

[33] Insofar as any controversy may have emerged on the full extent of this Court's powers on review, it has been finally settled by the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Limited and Others*.³

[34] In the *Herholdt* decision, the SCA recognised the continued applicability of the gross irregularity ground of review.⁴ The SCA, however, considered that the upper ground of review (based on unreasonableness) should apply a little more narrowly than certain Judgments of the LAC and this Court had previously found. The key paragraph of the SCA decision is the following:

'In summary, the position regarding the review of CCMA awards is this: a review of a CCMA award is permissible if the defect in the proceedings falls 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 Section 145(2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry 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 particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'⁵

[35] In my view, the effect of the SCA decision is important, but hardly extraordinary. It is not open to an applicant to seize upon errors of fact or law (gross irregularities) made by a commissioner/arbitrator and regard these as being sufficient to sustain a review application. The errors must have led to an unreasonable result (i.e. ultimate decision). But this does not mean that errors of fact or law by commissioners will not make for a successful review challenge

³ See: *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA).

⁴ See: s145 (2)(b) of the LRA.

⁵ At para 25.

in appropriate cases. I consider the following observations by Murphy AJA in the LAC Judgment in *Herholdt v Nedbank Limited* [2012] 9 BLLR 857 (LAC), to remain instructive:

‘... I imagine, few decisions that are wrong are likely to be upheld as reasonable. Leaving aside the moral hazard of a message to commissioners that there is no need to get their decisions right, it being enough if they act reasonably, commissioners who get it wrong on the facts will usually commit the concomitant irregularity of not taking full or proper account of material evidence, and where they erred on the law, they will fall short in not having properly applied their minds to the issues and thereby having denied the parties a fair trial. The inexorable truth is that wrong decisions are rarely reasonable....’⁶

[36] The above notwithstanding, I am of the view that none of the grounds of review raised by the Applicant have any merit in this matter.

Conclusions

[37] Having considered the above, I find that the Commissioner has not misconducted himself or committed a reviewable irregularity in terms of section 145 or the principles referred to in the jurisprudence above for the following reasons:

37.1 he has properly considered the evidence led by all of the parties at the arbitration. His finding that the Applicant had unfairly split certain complaints was correct given the nature of the evidence before him;

37.2 he correctly found that the circumstantial evidence led by the Applicant was unsatisfactory. It is clear from the evidence of the Applicant’s own witnesses that –

37.2.1 the Branch Manager should have been in possession of the key to the storeroom and ensured that it was locked;

⁶ At para 55 of the LAC Judgment.

- 37.2.2 there had been numerous issues and problems with the locking of the storeroom over a period of time;
- 37.2.3 although the Applicant raised the issue that the Commissioner failed to take into consideration the circumstantial evidence, and that this circumstantial evidence was satisfactory and disclosed a chain of events, I disagree. I have noted the judgments referred to me in the Applicant's Heads of Argument⁷, and I disagree that the facts of this case are distinguishable. I have already referred to why this is so above. In addition to this, the Applicant disciplined the Branch Manager and Supervisor. All of these individuals were also involved in the overall securing of the tally rolls and were sent to Ntlhekoa;
- 37.2.4 the only evidence, after all is said and done, which lay against Ntlhekoa was that of the polygrapher and her version that she knew the door was not locked. I agree with the Commissioner's finding that the evidence of the polygrapher was not persuasive and cannot be relied upon to find Ntlhekoa guilty of any of the offences other than negligence. This Court and the Labour Appeal Court has dealt with the admissibility of polygraph tests as evidence. The Labour Appeal Court in *DHK Supply Chain (Pty) Ltd and others v National Bargaining Council for the Roadfreight Industry and others* [2014] 9 BLLR 860 (LAC) sets out the jurisprudence on polygraph tests and concludes that "*In summary, the respectability of polygraph evidence, at best, remains an open question, and any litigant seeking to invoke it for any legitimate purpose, must, if needs be, adduce expert evidence of its conceptual cogency and the accuracy of its application in any given case;*"

⁷ *Aluminium City (Pty) Limited v Metal and Engineering Industries Bargaining Council and Others* (2006) 27 ILC 2567 (LAC); *Standard Bank of SA v Mosime N.O. and Another* 2008 (29) ILJ 3078 (LAC).

- 37.2.5 It does not appear that the polygrapher was led as an expert in the traditional sense. No expert notice was submitted. Notwithstanding this, I cannot fault the Commissioner's finding on the corroborative value of Snyman's evidence;
- 37.3 the Commissioner complied with what he was required to do in terms of the pre-arbitration minute. He was required to assess whether Ntlhekoa was guilty of the complaints lodged against her. This he did. He found her guilty of one of the complaints, namely negligence;
- 37.4 the Commissioner considered the fact that Ntlhekoa had a clean disciplinary record as a mitigating factor. This was something he was required to do;
- 37.5 the Commissioner's finding that because he has found in favour of Ntlhekoa, in these circumstances, in terms of the pre-arbitration minute, the amount of compensation was pre-determined in the form of six months or the balance of her contract of employment is not correct. Ntlhekoa was seeking compensation of six months or the unexpired portion of her contract, whichever was the greater. It did not mean that the Commissioner was required to automatically award this. Nevertheless, although the Commissioner's interpretation of the pre-arbitration minute in this regard was incorrect, I do not find it to amount to a gross irregularity requiring me to intervene with the Commissioner's award. It is trite that an error does not mean an award is automatically reviewable. In the circumstances of this case, I believe that the award of six months compensation was correct.

Order

[38] In view of the above, the Judgment handed down on 21 October 2016 is rescinded and set aside and replaced with the following Order -

- 38.1 the Applicant's application is dismissed
- 38.2 there is no order as to costs.

D Woodhouse, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate Hutchinson brief by Fluxmans Incorporated

For the Respondent: Advocate P Nkutha briefed by Finger Phukubje Inc