THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 64/2014

In the matter between:

IBM SOUTH AFRICA (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION,MEDIATION AND ARBITRATION (CCMA) First Respondent

DAIZY MANZANA N.O Second Respondent

SHAMALA PILLAY Third Respondent

Heard: **05 January 2016**

Delivered: 19 April 2016

JUDGMENT

HAWYES AJ

Introduction

[1] The Applicant seeks to review and set aside the arbitration award of the Second Respondent ("the Arbitrator") in which latter found that the dismissal of the Third Respondent during her probation period was unfair and ordered retrospective reinstatement.

[2] The Third Respondent did not persist in arguing any matter requiring condonation at the subsequent hearing of the review and I will therefore focus on the substantive merits at hand.

Background Facts

[3] The brief history of this matter is as follows: - The Applicant, an International IT and Consulting Company, operates a consulting firm in South Africa. The Third Respondent formerly a senior executive at a local bank was employed during July 2012 in the position of a consultant. Her employment was subject to a 6 month probation period.

[4] It is common cause that Third Respondent was dismissed at the end of her probation period and before any form of permanent employment was confirmed.

[5] Applicant's management had formed the view over the six months of Third Respondent's probation that she was fundamentally unsuited to the world of consulting. In the view of Applicants managements Third Respondent lacked the DNA of a consultant. They were also of the view that Third Respondent lacked the necessary skills of adaptability to sudden change, the willingness to undertake a wide range of work, some of it relatively menial, the willingness to

undertake unfamiliar work in new fields and that her personality was probably better suited to employment on the client side i.e. in corporate life. The Third Respondent seemed to be incompatible with the position for which she had been hired.

[6] In its prayer for relief the Applicant requested that the Court not order that the matter be remitted back to the First Respondent for rehearing. The order sought was that the Second Respondent's award be set aside and replaced with an order that Pillay's dismissal was procedurally unfair but substantively fair and that I order equitable compensation. The Applicant argued that compensation in the region of three months' salary would be equitable in the circumstances.

[7] In amplifying its submission that its dismissal of the Third Respondent was procedurally unfair Applicant's Counsel (in his heads of argument) argued that the Third Respondent was given short notice that IBM was considering not confirming her employment. With reference to a contentious meeting that took place on the 16 January 2013, Applicant's Counsel conceded that Third Respondent should have been given more notice of the meeting, its purpose and the grounds on which Applicant believed her employment should be terminated.

[8] Third Respondent's Counsel criticised inter alia, the fact that Applicant had not delivered a supplementary affidavit i.t.o Rule 7A (8) 9a) notwithstanding indicating an intent to do so. Counsel for the Third Respondent argued that the Applicant had not expanded upon the grounds of review relied upon by the Applicant in its founding affidavit and argued further that the record of proceedings before the Commissioner did not reveal any grounds to review the Arbitration award. Counsel also argued that the record did not reveal that the Arbitration award is one which a reasonable Commissioner could not make.

The Arbitration Award

[9] The Arbitrator and Second Respondent heard no less than 530 typed pages of evidence. The testimony of two witnesses namely Mr David Abel and Pretty Charles was reconstructed ex post facto and forms part of the updated transcript of proceedings.

[10] The Second Respondent found in her Arbitration award that the Third Respondent was dismissed because of incompatibility. She also found that she was not presented with evidence to prove that the Third Respondent was made aware of her incompatibility or that the Third Respondent did not work well with her colleagues or caused disharmony in the workplace.

[11] The Arbitrator also dealt with Applicant's witnesses' testimony that Applicant failed to meet the required performance standards. The Arbitrator found that she was not presented with evidence to prove that standards were set for the Third Respondent. As such the Applicant had not proved that Applicant failed to meet the performance standards.

[12] The Arbitrator also found at paragraph 46 of her award that it was common cause that the Third Respondent lodged a grievance that 80% of her job content was changed without consultation and that she was moved from a Standard Bank account without consultation. At a meeting held on the 3 December 2013 Pretty Charles from HR indicated that the grievance would be investigated. Third Respondent harboured the view that she was being constructively dismissed and requested a separation package. At a follow up meeting on the 14 December 2012 Third Respondent was advised that her claim for a constructive dismissal was baseless and that the company was seriously considering not confirming her employment.

[13] Third Respondent expressed the view that she had excelled in her performance and was punished for lodging a grievance.

[14] The Arbitrator also drew attention to another reason provided for the dismissal of the Third Respondent namely that she was inflexible whilst the consulting business required flexibility. The Arbitrator found that it was common cause that the Third Respondent was employed with knowledge from the Applicant that she had no consulting experience. The Arbitrator also found that it was common cause that Third Respondent was moved from the Standard Bank project without consultation. According to the Arbitrator all the Applicant's witnesses had based their testimony that Third Respondent was inflexible on one incident- the Standard Bank project. The Arbitrator found that it was unfair to judge Third Respondent's flexibility on this one incident and concluded that the dismissal of the Third Respondent was substantively unfair.

[15] The Arbitrator made no comments or finding on the aspect of procedural fairness.

[16] The Arbitrator did not evaluate the details of the meeting held on the 16 January 2013, which meeting according to the Applicant was held to discuss Third Respondent's probation which was about to expire. The evidence of what transpired at the meeting differs completely.

[17] Wellborn and Maroke testified that a document (Record pg. 139) containing a detailed list of issues was prepared beforehand and was discussed with Third Respondent in some detail during the meeting. They testified that Third Respondent was asked to respond and specifically motivate why her employment should be confirmed. Third Respondent responded that she wanted a letter of termination and asked about payments for her cell phone and commission for introducing candidates for employment to IBM. She was not interested in discussing the issues tabled by Welborn. As a result her employment was not confirmed and she was later issued with a termination letter.

[18] Third Respondent testified that she was called in and told that her employment would not be confirmed. There was no discussion as to the reasons for this and Welborn did not have the document alleged with him at the time (she and her attorney allege that Welborn and others fabricated this document at a later stage). She was effectively escorted from the premises and this was the most humiliating day of her life.

[19] The Arbitrator found that in the absence of evidence on the breakdown of the trust relationship the primary remedy of reinstatement must follow (Award para. 50).

The test on review

[20] The test for review of an Arbitrator's decision is found in the seminal Constitutional Court decision of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Case CCT 85/06) (Decided on the 5 October 2007)***.** The Labour Court must ask: is the decision reached by the commissioner one that a reasonable decision-make could not reach?

[21] A subsequent case helps in recognizing an unreasonable decision. In *Bestel v Astral Operations and Others/ (LAC Case JA 37/08) (Date of Judgement: 16 September 2010)* it was held that a commissioners finding, on the facts, will be considered unreasonable if the finding is:

1.1. Unsupported by the evidence:

1.2. Based on speculation by the commissioner;

1.3. Entirely disconnected from the evidence;

1.4. Supported by evidence that is insufficiently reasonable to justify the decision;

1.5. Made in ignorance of evidence that was not contradicted.

[22] More recently the Supreme Court of Appeal had the opportunity to comment on the implementation of the *Sidumo* test in *Herholdt v Nedbank Ltd (701/2012 [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA) (5 September 2013)***.**

[23] Section 145 (2) of the Labour Relations Act no 66 of 1995 (as amended) (LRA) gives limited grounds for review i.e. misconduct by the Arbitrator, gross irregularity in the arbitration process, exceeding the Arbitrator's power and an award that was improperly obtained. Courts later said that the award could not be "unreasonable".

[24] The *Herholdt* case identified two types of reviews-

- Results based reviews (which attack the result) and process related reviews (which attack the process followed by the arbitrator in arriving at the result).

[25] The test for unreasonableness is (and remains) the *Sidumo* test: that the decision falls outside a range of reasonable outcomes. This can be tested by asking the question: if the Arbitrator had applied his/her mind to the facts/considerations which she ignored, may she have come to a different conclusion. If so then the award should be reviewed.

Grounds for review

[26] Whilst conceding procedural unfairness the Applicant argued its case that no reasonable Arbitrator could have ordered reinstatement.

[27] Counsel for the Applicant argued that that the Arbitrator manifestly failed to deal with the substantial evidence to show that reinstatement was not practicable and that the relationship of trust between the parties had indeed irretrievably broken down.

[28] Counsel for the Applicant referred to numerous examples (detailed at paragraphs 201.1 to 20.9 of Applicants heads) in support of their argument

that the Arbitrator failed to consider the destructive effects of the conduct of the Third Respondent and her attorney during the arbitration proceedings which effectively destroyed any chance of resuming a working relationship'

[29] Counsel for the Applicant also argued that the Arbitrator failed to apply her mind to the issues of whether Third Respondent's dismissal was substantively fair which instances are mentioned at paragraphs 25.1 to 25.4 of Applicant's heads.

[30] Third Respondent's Counsel argued that the Applicant had raised no substantial grounds of review in respect of substantive fairness of the Third Respondent's dismissal (see paragraph 14 of the Third Respondent's heads and those that follow).

Analysis of the parties submissions

[31] It is evident that the Arbitrator did not apply her mind to a number of important aspects of this case.

[32] The first was addressed and conceded by the Applicant. It relates to the evaluation of the evidence pertaining to procedure. The Arbitrator only applied her mind to substance.

[33] The Arbitrator did not take cognizance of the fact that the Third Respondent was serving a six months' probation period. The requirements resting upon an employer when dealing with an employee on probation are set out at Item 8 (Probation) of Schedule 8 of the LRA (Code of Good Practice: Dismissal).

[34] Of particular relevance to any challenge to an employer's right to dismiss a probationary employee is Item 8 (1) (j) that states as follows;

- "Any person making a decision about the fairness of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than

would be the case in dismissals effected after the completion of the probationary period."

[35] Although the wording of Item 8 (1)(j) leaves a lot to be desired it effectively means that during probation, before the employee is established or entrenched in the workplace, the employer has the right to dismiss for lesser reasons than would be the case after probation. This must be acknowledged and applied by any Arbitrator or Court considering the matter.

[36] In this matter the Arbitrator did not draw a distinction between a permanent employee and one on probation and proceeded to treat the Third Respondent as if she had been dismissed as a permanent employee.

[37] Had the Arbitrator applied her mind to the concept of 'less compelling reasons' which is applicable to the dismissal of probationary employee she would have given a more empathetic ear to the concerns of the Applicant relating to the Third Respondent's work performance, compatibility to fit into the IBM workplace plus her general attitude and demeanour.

[38] The employer has the right to 'test' the employee in different situations and determine whether she is capable of coping with the rigours of permanent employment. If a probationary employee is found to be wanting on key aspects of the job description the employer is at liberty to follow its instincts and not appoint the employee permanently. These important but often intangible considerations are inherent in the context of 'less compelling' reasons.

[39] The Arbitrator failed to adopt a holistic approach to the large body of evidence before her and failed to consider and place the Third Respondent's performance and behaviour during her probationary period in its proper context. This Court dealt with the distinction to be drawn between a probationary employee appointed to a responsible position and a junior employee on probation in the case of *Rheinmetall Denel Munition (Pty)(Ltd) v*

National Bargaining Council for the Chemical Industry and others (2015) 36 ILJ 2117 (LC).

[40] The Court held that when dealing with a person on probation in a responsible position like a professional assistant, where the person claims to have the necessary experience to do the job, it is not unreasonable for the employer to simply point out the perceived shortcoming of the probationer and to emphasize the importance of improving her performance if she wants to be permanently employed. The Court found that the Bargaining Council Arbitrator had failed to appreciate this and appeared to believe that the employer had to treat such a probationer as someone who was still in training.

[41] The Third Respondent was a senior employee where much was expected of her as a consultant. She earned a remuneration package commensurate with the obligations she was expected to face. The Arbitrator incorrectly treated the Third Respondent as if she was a junior employee who was not given enough time to prove herself and who required constant direction, standards, coaching and prodding to perform at a premium.

[42] The Arbitrator failed to deal with the large content of evidence that pointed to the conclusion that reinstatement was not practicable and that the relationship of trust between the parties had irretrievably broken down. The Arbitrator failed to consider that the Third Respondent herself was not happy in her station and actively sought payment of money and a termination of the employment relationship.

[43] Finally, the Arbitrator failed to consider the various undisputed utterances made by the Third Respondent and her attorney after Third Respondent's dismissal that must, inevitably, have impacted upon the relationship between the parties.

[44] In light of the Arbitrators failure to apply her mind to all the aspect s cited above it cannot be said that the decision which she reached was a decision a

reasonable decision maker could reach. As a consequence interference by this Court with the Arbitrator's decision is necessary and warranted.

[45] Given the amount of time that has lapsed since the arbitration award was rendered it would not be prudent to refer the matter back to the CCMA to be re-heard before another Commissioner.

[46] After consideration I believe that a compensation award is appropriate to address Applicant's admitted procedural shortcomings in attending to Third Respondent's dismissal.

Order

[47] The Second Respondent's arbitration award is hereby reviewed and set aside and replaced with an order that Third Respondent's dismissal was substantively fair but procedurally unfair.

[48] The Applicant is ordered to compensate the Third Respondent for three months gross salary. The Third Respondent earned R124 000 per month. Applicant is ordered to pay the Third Respondent the sum of R372 000 (less applicable taxes) within 14 days of the delivery of this judgement.

[49] After reflection no order as to costs is made.

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HAWYES AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT: Adv. G. Fourie

Instructed by: Weber Wentzel Attorneys

FOR THE THIRD RESPONDENT: Anthony Hinds Attorneys