IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
CASE NUMBER :JR 2305/08

In the matter between:

THANDILE MAKUBALO	**Applicant**
and	
THE COUNCIL FOR HIGHER EDUCATION	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
COMMISSIONER JOSEPH TSABADI N.O	**Third Respondent**

JUDGMENT

Bhoola J :

Introduction

[1] The applicant seeks an order reviewing and setting aside an arbitration award issued by the third respondent ("the arbitrator") in his capacity as a Commissioner of the second respondent, and substitution with an order to the effect that her dismissal from the employ of the first respondent was substantively and procedurally unfair. The applicant also seeks condonation of the late filing of her review application. The first respondent opposes relief both on the merits and in respect of condonation.

Background facts

[2] The applicant was employed as a Manager in the Institutional Audit Directorate of the first respondent for a fixed term period for two years, effective 10 January 2007. She was subject to a three month probation period, which could be extended at the first respondent's discretion. Her probation period was extended on two occasions.

[3] The applicant reported directly to Dr Mark Hay ("Hay"). Hay conducted the first performance assessment with the applicant three months after her appointment, and informed her of various areas in which she was required to improve. Although she did not agree with his assessment she took steps to improve her performance. Hay's report on his assessment, dated 2 April 2007, criticised the applicant's conduct at an audit she had attended as an observer, and questioned her interpersonal skills.

[4] The applicant testified that when she had asked Hay for an example of her lack of interpersonal skills he cited only the example that she never discussed her family at work. The applicant alleged that she was subjected to increasingly harsh public criticism by Hay, but simultaneously praised in private on numerous occasions. This was not refuted by Hay as he was not called to testify at the arbitration.

[5] The applicant testified that she had requested assistance in order to improve her performance.

[6] The applicant's performance was assessed for the second time by Hay during June 2007. She was informed that her performance had not improved satisfactorily. She again requested assistance to enable her to improve. Hay recorded an improvement in her interpersonal skills but noted that *"there is still a need to develop the necessary interpersonal skills and leadership as an audit officer".* Up to this point the applicant testified, she had attended institutional audits but only as an observer.

[7] The relationship between Hay and the applicant deteriorated markedly after this and Dr Lange ("Lange"), Hay's senior intervened. Hay was instructed to apologise to the applicant and to be more supportive of her.

[8] In an internal memorandum dated 14 June 2007 Lange confirmed to the applicant that her probation would end on 10 July 2007, but would be further extended to 10 October 2007, in order to give her an opportunity to conduct an institutional audit, which was the focus of her job description. Up until this stage the applicant had not yet been assessed on her core duties, as she had not been given an opportunity to perform in her role as audit manager of an institutional audit.

[9] During August 2007 the applicant was given the opportunity to conduct an audit of the Durban University of Technology ("DUT"). By all accounts the audit was complex and difficult. The chairperson dominated the proceedings to such an extent that panelists were largely sidelined. Hay and Lange had a discussion with the applicant in which they pointed out the shortcomings they had observed in her conduct of the audit. Lange indicated that the applicant lacked the intellectual, social and administrative capacity to conduct the audit. The applicant's view was that this was a matter of Lange's opinion. At the conclusion of the audit Hay prepared a report recording areas of performance of the applicant which fell short of the required standard and in which, in his view, she could improve. Hay also criticized the applicant for allowing the chairperson to dominate the proceedings and for not failing to force him to be more inclusive of the other panelists. Hay criticized her for taking notes instead of facilitating the audit process, and for her limited engagement with the panelists. He records that he had received comments about her inability to act as audit officer, and that he effectively took over as audit officer. The applicant avers that this document was only brought to her attention after her dismissal, although it appears that in cross examination during the arbitration she conceded that she had seen it prior thereto.

[10] On 29 August 2007 the applicant was summoned, without prior warning, to a meeting with Hay and Lange. She was informed that her services would be

terminated on the basis of poor performance and later that day she received a written notice dismissing her with effect from 10 October 2007.

[11] She referred an unfair dismissal dispute to the second respondent.

The arbitration and award

[12] Only Lange and the applicant testified at the arbitration.

[13] Lange's evidence was in essence that the applicant's overall performance was not found to be competent; there were complaints from auditors and staff about her performance; she did not advise management about support that she required in order to improve; and that her probation was extended to give her an opportunity to improve and in particular to conduct a full scale audit on her own. The applicant had attended audits as an observer and even in this regard there had been complaints about her lack of interpersonal skills in interacting with the auditors and the lack of her intellectual and strategic capacity. There were small signs of improvement in the second performance assessment, but this was insufficient to fulfill the requirements of her position. The applicant failed to fulfill the functions required of her during the audit she conducted. Lange met with the applicant during the audit to discuss her concerns and the applicant indicated that these were matters of subjective opinion on the part of Lange which she did not have to accept. The applicant did not accept that she had to improve and blamed others for her shortcomings. The reputation of the first respondent was at stake in that other auditors on the panel complained about the applicant to Lange.

[14] The applicant testified that she performed to the best of her ability even in her capacity as an observer, and always received praise for her performance. In conducting her first audit at DUT she acknowledged that she needed assistance in some areas. Her performance was evaluated on two occasions. She never objected to the outcome of the appraisals and duly signed the appraisal forms, because she wanted to indicate to her employer that she was open to constructive criticism but this did not necessarily imply her acceptance of the outcome. Her relationship with Hay was one of public praise and private condemnation. She did not accept that auditors and staff complained about her performance as none of these complaints were brought to her attention. She was asked to step down as audit officer during the DUT audit, which was demoralizing to her and affected her performance adversely. She was surprised when she was informed that her appointment would not be confirmed as she had always been showered with praise and performed to the best of her ability. Her dismissal was accordingly substantively and procedurally unfair.

[15] The arbitrator found that the first respondent had succeeded in showing on a balance of probabilities that the applicant's dismissal was fair. During the applicant's seven months with the first respondent, her performance had been assessed twice and had been found to be wanting. On both occasions she signed the appraisal forms indicating thereby that she agreed with the outcome. On both occasions she failed to show any visible sign of progress. Her probation period was extended to enable her to perform an audit role as manager and she failed to perform to the standards required of her. The arbitrator found in essence that:

"The applicant was appointed as a manager and at that level she was expected to hit the ground running and not to be spoon fed. When the applicant's probationary period was extended for the first time, the Applicant should have seen that the writing was on the wall and made some very serious efforts to improve her performance. Instead the Applicant apportioned the blame to everyone else except herself. Even the auditors who are not attached to the business of the Respondent, who had therefore no axe to grind against the Applicant, complained about her performance".

[16] The arbitrator found correctly that in evaluating the fairness of the dismissal of an employee on probation in the context of Schedule 8 - The Code of Good Practice : Dismissal ("the Code"), that "*one needs to accept less stringent requirements for dismissal as compared to that applicable to tenured employees".*

[17] The dismissal of the applicant was accordingly confirmed.

The parties' submissions

[18] The primary issues to be determined on review, as submitted by the applicant are:

(a) Whether the arbitrator properly assessed the applicant's performance as falling so far short of the standard required as to justify dismissal;
(b) Whether the applicant had been given sufficient opportunity to improve and gain experience;
(c) Whether the fact that the dismissal occurred during the applicant's probation period was given undue weight by the arbitrator; and
(d) Whether the arbitrator's treatment of hearsay evidence constitutes a gross irregularity in the proceedings or an error of law.

[19] It is apparent from the reasoning of the arbitrator that he placed great weight on the following factors, which the applicant submitted are mostly factually incorrect or legally unsound:

(a) That the applicant's probation was extended thrice. In fact, it was only extended twice and it was only after the second extension that she was given the opportunity to act as audit manager. Mr Van Der Riet, on behalf of the first respondent, conceded that this arose from an error made by the applicant's legal representative at the arbitration.
(b) That the applicant failed to make an effort to improve her performance and never sought assistance with this. In fact, the evidence was that applicant had admitted she could improve and requested support which was not forthcoming.
(c) The employer had done whatever it could do to improve the applicant's performance. In fact, she was only given half a chance at one audit and no remedial steps were taken to improve her performance.
(d) The requirements for dismissing an employee on probation are less stringent than for tenured employees. In fact, fairness is still a requirement of the Code, including the right to be heard prior to being dismissed and other rights of procedural fairness.

(e) The applicant's conduct had irretrievably damaged the trust relationship with her employer, justifying her termination. In fact, the application of a test for misconduct dismissal to an incapacity dismissal amounts to a material error of law and vitiates the award – the arbitrator clearly applied the wrong yardstick and treated the applicant as a repeat offender in a misconduct dismissal.

[20] Mr Fourie, for the applicant, submitted that it is apparent from his reasoning that the arbitrator:

(a) Considered and attached undue weight to inadmissible hearsay evidence, in spite of direct contradictory evidence. An example of this is the arbitrator's finding that the auditors complained about the applicant's performance. This was based on inadmissible hearsay evidence, and which was contradicted by the applicant's direct evidence that, besides one incident that appeared to have been based on a misunderstanding, she received nothing but praise from the auditor in question, Professor Hart.
(b) In the absence of evidence from Hay, inadmissible hearsay evidence regarding his conduct and interactions with the applicant was preferred in some instances to the direct oral evidence of the applicant, against whom no adverse credibility findings were made.
(c) Failed to consider or apply the appropriate test for judging the procedural and substantive fairness of a poor work performance dismissal, in regard to which the Code provides for dismissal as a reasonable sanction for failure to meet performance standards only where the employee has been made aware of the standard and has been given a reasonable opportunity to improve.
(d) Based his findings on facts which are not supported, and in some cases are directly contradicted by the admissible evidence.

[21] Mr Van Der Riet submitted that it cannot be said that the arbitrator's decision, concluding that the dismissal was both procedurally and substantively fair and dismissing the applicant's claim, made a decision that could not be made by a reasonable arbitrator. The arbitrator correctly found that the two appraisals of the applicant's suitability for the position showed clearly that the applicant needed to improve her performance if she wanted to fill the position she was appointed to. The arbitrator further correctly accepted the direct evidence of Lange that when the applicant was eventually given the opportunity to perform the function of an audit officer (in the DUT audit in August 2007), she demonstrated that she was unable to meet the required performance standards of the position. Lange was directly involved with the applicant in all the audits, and was in a position, as CEO, to observe and assess the applicant's capacity. She furthermore met with the applicant to discuss her performance, following which she recorded her main concern with the applicant's lack of interpersonal and strategic skills. This is key in the context of the role played by an auditor, which involves facilitation of a process whereby various academic experts (deans, vice chancellors, senior academics) expect to receive value from the quality assurance conducted by the first respondent. It was accordingly not on hearsay evidence that the arbitrator reached the conclusion as to the applicant's incapacity, but on the direct evidence of Lange. The arbitrator correctly concluded that before the employer finally decided that the applicant's employment had to be terminated at the end of the extended probation period, the

applicant had been given a proper opportunity to make representations. At the meeting of 24 April 2007 she was put on terms in respect of improving her performance, and provided with the detailed job description she requested, but she still failed to make the necessary progress. Nevertheless, her probation was extended a second time to enable her to make the necessary progress but she still failed to meet the standards of performance expected of her.

[22] Mr Van Der Riet submitted that the error citing three extensions of the applicant's probation does not render the award reviewable. The common cause fact that her probation was extended twice proves that the first respondent was willing to give her a further chance to prove her ability. However, when she was finally given the chance to play the role of an auditor, instead of simply observing the audit process, she failed dismally. She lacked insight into the most basic function required of her –that is to distinguish between issues that are central to the audit and those that are not – implying that she lacked insight into her own limitations. There is no basis on which a submission that the evidence does not support this finding can be sustained.

[23] In regard to procedural fairness Mr Van Der Riet submitted that there is no justification for the contention that an employee on probation, particularly as a senior manager, should be treated the same as a tenured employee given that it is the very purpose of probation to identify whether someone who presents an excellent curriculum vitae can actually perform in the job. Moreover, it is evident that the evaluation of an employee's performance is an ongoing process to determine whether or not the employee can perform to the required standard, and this is exactly what the first respondent sought to do. When she failed to meet the standard it gave her further opportunities to prove that she could do the job. The threshold, Mr Van Der Riet submitted, for dismissal of a probationary employee is a low one – the employee must have been given the opportunity to be heard and to improve – and this was eminently complied with *in casu*. The finding of the arbitrator is based on direct evidence and Hay's evidence could not have taken the matter any further. Accordingly there was no procedural irregularity that would warrant setting aside of the award on review.

[24] Mr Fourie submitted that the light of the test on review, as stated in *Sidumo, v Rustenburg Platinum Mines & Others* (2007) 28 ILJ 2405 (CC), and in *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC), even if this Court forms a *prima facie* view that the applicant failed to perform or if the outcome is accepted as one a reasonable arbitrator might reach, the reasoning of the arbitrator was so flawed and the test he applied so misplaced that it would be justifiable to set the award aside. The applicant does not seek to rely on an error of law but on a process of decision making that is so flawed that it is a gross irregularity.

[25] However, even though it may have been reasonable, as the first respondent contends, to take the trust relationship into account, in this instance the arbitrator went much further and found the applicant guilty of a breach of trust. This is a gross error of law and a reviewable irregularity. Relying on *Sun Couriers (Pty) Ltd v CCMA & Others* (2002) 23 ILJ 189 (LC), Mr Fourie submitted that where an arbitrator confuses issues of performance and misconduct when assessing a poor

performance dismissal, the award must be overturned on review. The application of the incorrect legal test amounts to a gross error of law and will render the award reviewable.

[26] Mr Van Der Riet conceded that the language used in connection with the trust relationship by the arbitrator was awkward, and submitted that even if it was accepted that this amounts to application of the wrong test, on the authority of *Sun Couriers*, the arbitrator was simply required to find that the employer had succeeded in showing objectively that the performance standard had not been met. The fact that the arbitrator applied a higher standard *in casu*, and even if it is accepted that he found the applicant guilty of misconduct, this does not mean that the lesser standard of incapacity had not been met. The employer did not blame the applicant for her conduct and instead stepped in to assist her by, for instance, accepting that her relationship with Hay was problematic and attempting to deflect this.

Merits of the review

[27] The applicant takes issue both with the finding and the process related conduct of the arbitrator. She bases her case on process irregularities that also taint the outcome of the award. It is by now established, following *Sidumo,* that reasonableness is pertinent to both. In essence a review under section 145 (1) and (2) of the Labour Relations Act, 66 of 1995 ("the LRA") requires that the outcome of arbitration proceedings must fall within a band of reasonableness, but if the process is tainted (for instance by the arbitrator failing to take material evidence into account, or having regard to irrelevant or inadmissible material, or commits another gross irregularity during the proceedings such as an error of law), the decision can be set aside regardless of the fact that the outcome is reasonable.

[28] In *Sidumo,* Ngcobo J emphasized the role of reasonableness in relation to the process, and its impact on the outcome, in the following terms :
"It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing…the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145 (2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings"[1].

[29] In assessing whether in fact the award is unreasonable it must be noted that the crux of the applicant's case appears to turn on two issues:
(a)The arbitrator took inadmissible evidence into account and based his factual findings on facts which are not supported by, and in some instances are directly contradicted by the admissible evidence; and
(b)The arbitrator applied an inappropriate test (more suitable to misconduct dismissals) in determining the procedural and substantive fairness of the dismissal.

[1] At para 268.

[30] In considering these grounds in the light of *Sidumo*, in my view, it is apparent from the award and reasoning of the arbitrator that they are manifestly without merit. The applicant has not established the existence of any reviewable irregularity committed by the arbitrator in the process or the outcome. On the first issue the arbitrator's central findings are based on direct evidence given by Lange and supported by documentation. The applicant signed the appraisals received from her supervisor. Lange was involved throughout in assessing the applicant's suitability for the position she was hired for and attended all the audits, including the DUT where it became apparent that the applicant was not able to meet the performance standards required of her. It is apparent from the arbitrator's reasoning that it is this evidence that was taken into account. It is accordingly not correct for the applicant to contend that the arbitrator made a conclusion based on hearsay evidence.

[31] The contention by the applicant that the incorrect test was applied by the arbitrator in that he referred to the "*commercial rationale*" for the dismissal and found that the applicant's conduct had "*irretrievably damaged the relationship of trust which is the hallmark of any employment relationship",* is similarly without merit. The arbitrator stated that the applicant was "*put in a responsible position of trust as a Manager : Institutional Audit and she has betrayed that trust by failing to perform up to the required standard of performance despite the assistance given. The applicant's conduct has irretrievably damaged the relationship of trust which is the hallmark of any employment relationship".* Although it is not tenable, as Ngcobo J stated in *Sidumo*[2]*,* for commissioners to make statements that are unclear, and such a statement could indeed be said to fall into this category, viewed in context it does not imply that the wrong test was indeed being applied, or that the arbitrator had regard to material that was not relevant. This does not amount in my view to a gross irregularity or one that would vitiate the process and the outcome in its entirety. Likewise the arbitrator's reference to commercial rationale *per se* does not demonstrate a lack of understanding of the applicable test for an incapacity dismissal. From the context it would appear that the arbitrator was attempting to distinguish rational from arbitrary conduct hence the conclusion that far from acting in a capricious manner, the first respondent made a decision that was fair, valid and reasonable.

[32] In my view the award cannot be said to be one that a reasonable arbitrator could not have made.

Condonation

[33] The applicant submits that good cause exists for her failure to bring the review application within the six week period stipulated in section 145(1)(a) of the LRA. The employer opposed condonation on the grounds that no satisfactory explanation for the delay has been forthcoming and that no prospects of success exist. Having heard the parties' submissions and having read the pleadings, I am satisfied that a satisfactory explanation has been provided for the delay.

[2] Supra, at para [283].

[34] In the premises, I make the following order :

The review application is dismissed, with costs

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Bhoola J
Judge of the Labour Court of South Africa

Date of hearing : 9 February 2010
Date of judgment : 23 February 2010

Appearance :
For the applicant : Advocate G A Fourie instructed by Howes Inc. Attorneys

For the first respondent : Advocate J G Van Der Riet SC instructed by Cheadle Thompson & Haysom Inc.