



Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 503/14

In the matter between:

Tryphina SEABELO

Applicant

and

JEROME MTHEMBU N.O.

First Respondent

PSSSBC

Second Respondent

DEPT OF HEALTH : FREE STATE

Third Respondent

Heard: 25 November 2015

Delivered: 25 November 2015

Edited: 20 January 2017

Summary: Review – LRA s 186(2)(a) – unfair labour practice --- demotion. Arbitrator ruled applicant had not discharged the onus to prove unfair labour practice. Application for review -- ruling on recusal – applicant alleges bias on part of arbitrator. No apprehension of bias shown. Award not reviewable.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application for review of an arbitration award in which the arbitrator (the first respondent) found that the applicant, Ms Tryphina Seabelo, had not proven the existence of an unfair labour practice in the form of a demotion in terms of s 186(2)(a) of the LRA.¹

[2] I handed down an *ex tempore* judgment as far back as 25 November 2015. The applicant and counsel for the third respondent, the Department of Health of the Free State Province, were in court. The order that was issued on the same day reads:

“1. The application for review is dismissed.

2. There is no order as to costs.”

[3] It appears that, at some stage, the applicant asked for a transcript of the judgment. On 26 July 2016 a court clerk sent an email to my associate saying:

“On 25/11/2015 Judge Steenkamp was sitting in Court 2 with many matters. Amongst those matters was JR 503/14 of *Tryphina Seabola v Dept of Health*. An *ex tempore* judgment was delivered the very same day but unfortunately the recording machine malfunctioned towards the end of the proceedings and we did not manage to capture the *ex tempore* judgment for the same matter.”

[4] Further attempts to recover the recorded judgments came to nought. I was eventually given the file during the court recess in December 2016 with a request to reconstruct the judgment. I do so now.

Background facts

[5] The applicant was transferred to the post of ‘Assistant Manager: Special Events’. It was termed a ‘lateral transfer’. She lodged a grievance and asked that she “be replaced appropriately to my original position of assistant manager which now District Manager Grade 2 and should be

¹ Labour Relations Act 66 of 1995.

done with retrospective effect.” It was not resolved and she referred an unfair labour practice dispute in terms of s 186(2)(a) of the LRA to the Bargaining Council (the second respondent).

- [6] The Department denied that the applicant had been demoted. It submitted that she was not performing the same duties as the District Manager: Grade 2 as from the time of her lateral transfer and that her current post was purely administrative.

The arbitration award

- [7] The arbitrator (the first respondent) found that it was common cause that the applicant willingly accepted her lateral transfer to the events she had not discharged the onus to show that the Department had committed an unfair labour practice by demoting her. She had voluntarily and willingly accepted her lateral transfer and was bound by the election that she had made.
- [8] The application had asked the arbitrator to recuse himself prior to the hearing. He refused. The arbitration went ahead with no further objection by her.

Review grounds

- [9] .In her founding affidavit, the applicant raised the following grounds of review:
- 9.1 She had objected to the arbitrator, claiming that he was biased. “The outcome proved my suspicion in that indeed, the first respondent acted in a bias [*sic*] manner as it is indicated below.”
- 9.2 The arbitrator erroneously found that she willingly accepted her lateral transfer to the events post.
- 9.3 The arbitrator “appears to have only considered the [Department’s] submission and deliberately disregarded the applicant’s.”
- 9.4 The arbitrator “failed to apply his mind judiciously” when he pointed out that she had failed to state that the Chief Divisional Officer post is inferior to the Assistant Director’s.

9.5 The transfer was on less favourable terms and the arbitrator should have found that it was a demotion.

The applicant's argument

[10] In her written and oral argument, the applicant focused mainly on the allegation of bias. She argued that, by proceeding with the arbitration despite her objection, "a ground for review as been created."

[11] She further argued that the arbitrator "acted injudiciously in the arbitration and his arbitration award is reviewable."

[12] Lastly, she argued that the arbitrator "use a stricter test than the balance of probabilities which in itself is a reviewable factor."

Evaluation

[13] None of the applicant's grounds of review is sustainable. The arbitrator carefully considered the evidence before him; the owners in terms of s 186(2)(a) of the LRA; and the conclusion that he reached is not so unreasonable that no other arbitrator could have reached the same conclusion on the evidence before him. The award passes the test posited by *Sidumo*.²

[14] The applicant could not point to any evidence of bias on the record. Neither did she set out any facts in her founding or replying affidavit to sustain a reasonable apprehension of bias. In a replying affidavit, she says that "the issue of possible biasness [sic] was not raised an arbitration for obvious reasons. It was not raised precisely because the first respondent was to be assigned a task of judging himself which is inappropriate if one considers the rules of natural justice."

[15] There is simply no evidence on which to sustain this ground of review.

[16] The arbitrator correctly applied the onus required by s 186(2)(a). Having done so, he came to a reasonable conclusion on the balance of probabilities.

² *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

Conclusion

[17] The award is not reviewable.

[18] The applicant represented herself. I did not consider a costs award to be appropriate in law or fairness.

Order

[19] I therefore made the following order:

19.1 The application for review is dismissed.

19.2 There is no order as to costs.

Steenkamp J

APPEARANCES

APPLICANT: In person

THIRD RESPONDENT: T L Manye
Instructed by the State Attorney, Bloemfontein.