IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 166/2017

In the matter between:

NATIONAL EDUCATIONAL HEALTH AND ALLIED WORKERS obo VICTOR SIPHO MAKHUBEDU ('NEHAWU') — **Applicant**

And

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL — **First Respondent**

PANELIST, MR THANDO NDLEBE *N.O* — **Second Respondent**

DEPARTMENT OF HEALTH MPUMALANGA PROVICE — **Third Respondent**

Heard: 11 July 2019

Delivered: 19 July 2019

JUDGMENT

OLIVIER AJ

Introduction

[1] This is an application to review and set aside the arbitration award made by the Second Respondent, with case number PSH337-16/17 under the auspices of the First Respondent.

Background facts

[2] The Applicant argues that he was unfairly and unlawfully dismissed by the Third Respondent on 22 June 2016. The charges that led to his dismissal were that the Applicant failed to avoid irregular and/or unauthorised and/or fruitless and wasteful expenditure in relation to the appointment of three ward clerks and three Telkom operators at Evander Hospital (Reference number MPDOH-Local July 13/007 and MPDOH-Local July 113/008) whilst there was a moratorium in place on new appointments during 2014.

The Review grounds

[3] Central to the case of the Applicant is his allegation that the Second Respondent grossly misdirected himself on the reason for the dismissal in that the Chairperson of the disciplinary hearing dismissed him for appointing the three ward clerks and three Telkom operators. The Applicant argues that there is no conclusive evidence that he ever appointed any new employee at the Evander Hospital.

[4] In addition he argues that there was no proper evidence in relation to the rule that he has allegedly breached. In addition the Applicant submits that the Second Respondent grossly misdirected himself on the evidence properly put before him relating to the seriousness or gravity of the charges and in particularly whether a finding of guilt on such charges breaches the trust relationship.

[5] Finally, the Applicant also argues that the Second Respondent acted inconsistently in that other employees who were also charged in respect of the same charges, namely Mr. Sithole and Dr. Mhlongo were re-instated despite the fact that they were found guilty on the same charges.

[6] The Applicant also argued that two further employees, Mrs. Hlatshwayo and Mrs. Jiyane should also have been charged and dismissed. As such the Applicant argues that the Second Respondent committed a gross irregularly by misdirecting himself on the legal concept relating to consistency.

The review test

[7] In ***Sidumo and another vs Rustenburg Platinum Mines Limited*** and others ("Sidumo"), the Constitutional Court held that :

"in the light of the constitutional requirement (in section 33(1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, the reasonableness standard should now suffuse s145 of the LRA"

"the threshold test for the reasonableness of an award or ruling is the following:

is the decision reached by the commissioner one that a reasonable decision-maker could not reach"

[8] Following on Sidumo the Supreme Court of Appeal in the Judgment of ***Herholdt vs Nedbank*** **("Herholdt")**[1] held as follows:

"A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(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 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." (emphasis added).

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[1] [2013] 11 BLLR 1074 (SCA)

Following the Herholdt and Gold Fields judgments the Labour Appeal Court handed down the judgment of Mofokeng[2]. In this judgment, Murphy AJA, writing for the unanimous Court, provided the following exposition of the review test:

> "[32] Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.
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> [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesis* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

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[2] Head of Department Education v Mofokeng and Others [2015] 1 BLLR 50 LAC

[9] The dictum in Mofokeng says many important things about the review test. The dictum provides for the following analysis:

9.1 the first enquiry is whether the facts ignored were material, which will be the case if a consideration of them would (on the probabilities) have caused the commissioner to come to a different result;

9.2 if this is established, the (objectively wrong) result arrived at by the commissioner is prima facie unreasonable;

9.3 a second enquiry must then be embarked upon — it being whether there exists a basis in the evidence overall to displace the prima facie case of unreasonableness; and

9.4 if the answer to this enquiry is in the negative, then the award stands to be set aside on review on the grounds of unreasonableness (and vice versa).

The Commissioner's findings

[10] Should one have regard to the material findings made by the Second Respondent, a summary of which can be found in paragraph 47 of the arbitration award, it is clear that the Panellist carefully considered and analysed the evidence of Mr. Boikanyo, an independent witness who prepared a forensic report relating to the appointment of three ward clerks and three Telkom operators at the Evander hospital. It is common cause that the Applicant was appointed to the position of Deputy Director General: Finance of the Department of Health of the Mpumalanga Province. He conceded that he occupied a very senior position.

[11] The Commissioner was confronted with the common cause fact that only two (2) ward clerk posts and two (2) Telkom operator posts were advertised on 9 July 2013. In addition, Circular 28 of 2013 of the Department of Health dated 30 September 2013 placed a moratorium on the filling of positions due to the dire financial situation that persisted in the Province at the time. Managers were in particular directed to the following directive in Circular 29 of 2013 and dated 4 October 2013:

11.1 All post are frozen with immediate effect;

11.2 All Managers are directed to ensure that there is no over spend on the budget; and

11.3 Disciplinary action will be taken against Managers who violate this rule.

[12] In addition the Commissioner was also referred to the relevant provisions of the Public Finance Management Act ("PFMA"). The Applicant clearly stated during his examination in chief that he had knowledge of the PFMA and understood that his role as Deputy Director General: Finance or Chief Financial Officer involved taking responsibility for the finances of the Third Respondent.

[13] The PFMA defines "irregular expenditure" as expenditure other than unauthorised expenditure, incurred in contravention of or that is not in accordance with the requirement of any applicable legislation. Section 45 furthermore places an obligation on the Chief Financial Officer, amongst others, to ensure that the system of financial management and the internal control established for that Department is carried out within the area of responsibility of that official and that the Department's resources are used in an effective, efficient and economical manner.

[14] Furthermore, it could also not be disputed by the Applicant that as the Chief Financial Officer he was responsible in terms of Section 45 of the PFMA to take appropriate steps to prevent, within his area of responsibility, any unauthorised expenditure or fruitless and wasteful expenditure and to safeguard the assets of the Province.

[15] The Applicant testified that he was aware of the moratorium that was placed in respect of the filling of positions and the issuing of appointment letters during the 2013/2014 Financial Year. He however argued that although the positions in dispute were advertised during the 2013/2014 year, the appointments only became effective in the next Financial Year. He further argued that he merely recommended the appointments and that it was in fact the MEC who appointed

the persons to the positions. He denies that he transgressed any provision of the PFMA.

[16] The Applicant further argued that the Third Respondent acted in an inconsistent manner by not disciplining Mrs. Hlatshwayo or Mr. Sithole who recommended the appointments in the first place.

[17] The Third Respondent's main argument was that the Applicant's position as Chief Financial Officer placed on him a duty to take appropriate steps to prevent irregular expenditure and effectively manage the finances of his employer. Due to the fact that the Applicant had admitted that the appointments had taken place based on the recommendations he made during the 2013/2014 Financial Year, it argued that the Applicant actively decided to recommend the appointments whilst knowing that the recruitment process was in contravention of the moratorium and the decision to freeze all post.

[18] The Applicant also admitted that he signed the memorandums supporting the appointments on 24 February 2013 full knowing that only two (2) positions for ward clerk and two (2) positions for Telkom operators were advertised. The memorandum that he supported however recommended the appointment of three (3) ward clerks and three (3) Telkom operators, therefore one additional position each. The Applicant presented no evidence that the additional positions were budgeted for or that there were sufficient funds to pay the salaries of the additional appointees. In fact he agreed that it was a general practise in the Department to appoint more persons than the number of positions which were advertised.

[19] In paragraph 49 of the award the Second Respondent concludes that the Applicant was very much aware of the rules in respect of appointing persons in positions in respect of which there was a moratorium on appointments. Despite such knowledge, the Applicant still proceeded to recommend the appointments in the 2013/2014 Financial Year. As the Chief Financial Officer he was indeed the custodian of the finances of the Respondent and he should have known that his recommendation for the appointments would lead to additional persons

being appointed with the obvious consequence that additional expenditure would be needed to fund such appointments.

[20] The Second Respondent accordingly concluded that the appointments of the additional ward clerk and Telkom operator were irregular and in contravention of the PFMA and that the Applicant breached his obligations to safeguard the Third Respondent from such irregular expenditure.

Did the Commissioner misconceive the nature of the enquiry and his duties in connection with it?

[21] Having regard to the findings of the Second Respondent and the evidence presented by both Mr. Boikanyo and the Applicant the Court has formed the view that the Second Respondent properly considered all the relevant and material facts before him and that it is not the case that a reasonable Commissioner could have come to a different result.

[22] The Second Respondent asked all the correct questions in relation to the obligations placed on the Applicant as Chief Financial Officer by virtue of the provisions of Section 45 of the PFMA. He also properly considered whether the Applicant was able to prove that there was indeed a budget for the additional positions and whether in fact such positions were on the priority list. No such evidence was led by the Applicant and he persisted with a consistent denial that he had not breached the provisions of the PFMA.

[23] There was also no specific evidence placed before the Commissioner as to why Mrs. Hlatshwayo and Ms. Jiyane should have been disciplined or found guilty by the Department. In respect of the matters of Mr. Sithole and Dr. Mhlongo, the Applicant did not place sufficient evidence before the Second Respondent in order for him to consider particularly whether there was inconsistent application of discipline by the Third Respondent.

[24] The Court also finds that in respect of the matter of Dr. Mhlongo where the Second Respondent had also presided over arbitration proceedings relating to 3his dismissal, that there were not sufficient facts or circumstances placed before this court in order to consider whether there was inconsistent treatment

of the different parties. This Court was not seized with the matter of Dr. Mhlongo to consider all relevant facts and circumstances and therefore cannot be expected to express a view on the allegations of inconsistency placed before it by the representative for the Applicant. Such comparison would have required that the full record of the Mhlongo matter should also have been placed before the Court. This did not occur.

[25] In the circumstances the Court finds that the Second Respondent properly considered the evidence placed before him, considered relevant material facts and circumstances and arrived at a conclusion that is justifiable and reasonable in relation to the evidence placed before him.

[26] The Court is of the view that the Second Respondent had indeed pursued the correct enquiry, he considered relevant material before him and the result he arrived at is one that a reasonable decision maker could have reached. In addition the full conspectus of facts and the breach by the Applicant on the duties placed on him as custodian of finances of the Third Respondent are of itself sufficient evidence of a breakdown of the trust relationship, warranting dismissal. The Second Respondent's conclusion in this regard was accordingly also reasonable.

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

<u>Order</u>

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

G. J. P. OLIVIER

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: M.J Ponoane of Ponoane Attorneys

For the Respondents: Adv. Ferdi Venter

Instructed by: Adendorff Theron Inc.