



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1741/14

In the matter between:

MATJHABENG LOCAL MUNICIPALITY

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

MAPUTLE MOHLALA NO

Second Respondent

JAN HENRICK GREYLING

Third Respondent

Heard: 08 July 2016

Delivered: 06 October 2016

JUDGMENT

NTSHEBE, AJ

Introduction

- [1] This is an application in terms of Section 145 of the Labour Relations Act (“**the LRA**”).¹ In this application, the applicant seeks an order reviewing and setting aside of an arbitration award issued by the second respondent on 26 June 2010. The second respondent found that the third respondent’s dismissal was substantively unfair but procedurally fair.
- [2] The facts giving rise to this review application are as follows:
- 2.1 The third respondent was employed by the applicant as an engineer. At the time of his dismissal, he was occupying a position of Senior Manager: Engineering Services within the applicant; and
 - 2.2 On or about March 2009 the third respondent was charged with three counts of misconduct.
 - 2.3 The third respondent was found guilty on all three charges but dismissed on one charge only and given final written warnings on the other two charges. The charge he was dismissed for related to gross misconduct involving gross dereliction of duties or neglect of his duties. The basis of the charge was that during the period between 19 April 2007 and 20 January 2009 the third respondent failed, despite repeated requests, to provide the attorneys of the Municipality with a report of Tamek Consulting Engineers in order to place the afore mentioned attorneys in a position to be able to decide whether to issue summons against Tamek Consulting Engineers or not. As a result, the third respondent was thereafter dismissed on 10 May 2010.
- [3] He duly referred an unfair dismissal dispute to the first respondent. The matter could not be speedily dealt with as there were rescission applications at the Bargaining Council involving the parties including a review application wherein the applicant reviewed another arbitrator’s default arbitration award. As a result,

¹ 66 of 1995.

the matter was arbitrated on 04 to 06 June 2014 which resulted in the current review application.

- [4] In his award, the second respondent found that the third respondent could not reasonably be expected to produce a report of a project that did not fall within his area of responsibility. Further there was no evidence that the report that the third respondent was instructed to produce, engineering expertise was required. In his conclusion he founded that in the circumstances the report did not fall within the ambit of the third respondent's job responsibility and that the request was unreasonable. Therefore, the third respondent did not commit any dereliction of his duties. He thereafter ordered that the applicant should reinstate the third respondent retrospectively.

Review Application

- [5] It was argued by the applicant that the second respondent committed reviewable irregularities in his analysis of evidence in respect of the charges and that he arrived at a conclusion which no reasonable decision maker could have reached in finding the dismissal of the third respondent substantively unfair. Furthermore, the second respondent failed to have total regard to the evidence before him and failed to consider the principal issue and to properly evaluate the facts presented at the arbitration.
- [6] It was common cause during the arbitration that the third respondent did not submit the report as instructed. From the record, it is stated that around 04 December 2006 when the attorney who had been briefed in the matter met with the third respondent, he explained to the third respondent what kind of a report was required from him. The attorney even provided the third respondent with another engineer's report as a precedent.
- [7] The evidence of Andre Podbielski ("**Podbielski**") the attorney which was not challenged was that the third respondent told him that he knew what was required of him. He however, never received such a report from the third respondent.
- [8] Podbielski kept on following up the matter with the third respondent on a monthly basis, this continued until September 2007. He had also visited the applicant on

at least two or three occasions. This was urgent as the matter was going to prescribe. The claim, as a result of the third respondent not submitting the report which was necessary for the issuance of summons prescribed.

- [9] The third respondent never indicated or informed anyone within the applicant or to Podbielski that the report did not fall within his mandate. In any event, the evidence was that the third respondent, as an Engineer could have produced the report. This evidence before the second respondent was not challenged.
- [10] Furthermore, during the arbitration the third respondent testified that the project under which the report was required did not fall under his unit. The second respondent accepted this explanation and went on to hold that to expect the third respondent to produce the report was shifting responsibility unfairly by the applicant and therefore such amounted to an unreasonable instruction.
- [11] The third respondent had been given the instructions and numerous follow ups were made with him regarding the report. However, no explanation was given to the applicant or Podbielski for the failure to provide the report. Nowhere does the record reflect the third respondent having informed anyone within the applicant that such report did not fall within his area of responsibility. In fact, the evidence before the second respondent was that the third respondent kept on making undertakings to Podbielski that he would submit the report which ultimately he never did.
- [12] Therefore, this clearly indicates that the second respondent failed to apply his mind to the evidence that was before him. The second respondent failed to take the above into account and just accepted what the third respondent said in his defence. A commissioner arbitrating a dispute is required to evaluate and analyses the evidence presented at the arbitration.² This he did not do.
- [13] The second respondent did not properly apply his mind to the evidence that was before him and that resulted in an award which a reasonable decision maker could not have reached.³

² *South African Post Office Ltd v CCMA & Others* [2012] 11 BLLR 1183 (LC).

³ *Sidumo v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC)

Costs

[14] The applicant during the hearing of the matter did not persist with an order for costs. I do not think it will be fair to order the third respondent to pay the applicant's costs.

Order

[15] As a result, I order as follows:

15.1 The arbitration award issued by the second respondent is reviewed and set aside and substituted with the finding that the third respondent's dismissal was substantively fair; and

15.2 There is no order as to costs.

T Ntshebe AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Adv S.J. Mushet

INSTRUCTED BY: Lebea & Associates

FOR THE RESPONDENT: Adv W.A. Van Aswegen

INSTRUCTED BY: Peyper Attorneys