



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 180 /2017

In the matter between:

TRAVALGAR PROPERTY MANAGEMENT

Applicant

and

DEEPAK BAKSHI

First Respondent

J D SELLO N.O

Second Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

Heard: 5 December 2018

Delivered: 11 January 2019

Summary: Review application. Arbitrator's findings that the dismissal of the employee was unfair is not to be interfered with on review.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 23 December 2016 under case number GAJB 21078-16 where the Second Respondent (the arbitrator), found the First Respondent's (the employee) dismissal substantively unfair and awarded him compensation equivalent to six months' remuneration.
- [2] The employee opposed the application.

Background facts

- [3] The Applicant is a property management company. The employee commenced employment with the Applicant in January 2015 as an estate manager at the Sterlitzia body corporate, a large estate which consists of a few hundred units. The Applicant's case is that the position occupied by the employee was an important position and he rendered a service to a very demanding client. In August 2016, the employee applied for leave for a period of two weeks, which application was denied. The employee nonetheless absented himself from work and he was subsequently charged with one count of misconduct: gross insubordination for blatantly disobeying a direct instruction that he could not take two weeks' unpaid leave. The employee was dismissed in September 2016, after being found guilty of the said misconduct.
- [4] The employee subsequently referred an unfair dismissal dispute to the Third Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) and the matter was arbitrated on 12 December 2016.

The evidence adduced:

- [5] The issue to be decided by the arbitrator was whether the employee's dismissal was substantively fair as there was no challenge in respect of procedural fairness. The arbitrator found the employee's dismissal substantively unfair and ordered that he be paid compensation.
- [6] In order to assess the arbitrator's findings in respect of substantive fairness and the award he issued, it is necessary to consider the reason the employee was dismissed for and the evidence adduced at the arbitration proceedings. The employee was dismissed for gross insubordination by going on leave after

he was told that his application for leave was declined and after he was told that he could not take leave.

- [7] The Applicant's witness, Mr Shaun Germishuizen, is employed as the senior portfolio manager in which capacity he manages sectional title and home owners' association properties, including the Sterlitzia body corporate. In the Sterlitzia body corporate, there are 376 units and this is where the employee was employed as an estate manager. This is the only body corporate where a dedicated estate manager is employed to manage the estate on a daily basis in respect of finances and administration. The client is very demanding and expects the employee to be at the premises every day. In the event that the employee is not at work, the client is advised and if necessary, alternative arrangements are made to ensure that his duties are done.
- [8] On 17 August 2016, the employee made a follow up regarding a request that he had previously made to take two weeks' unpaid leave in order to take his ill father to India for treatment.
- [9] The Applicant indicated that it was unable to grant the employee two weeks' unpaid leave given the fact that they did not have sufficient staff to stand in for him at Sterlitzia and because the Applicant had been very accommodating in granting the employee time off. The periods the employee was granted time off between 30 June and 29 July 2016 had been set out in an electronic mail to him and it was made clear that operationally, the Applicant could not afford another two week's absence from the employee. The leave already granted to the employee was family responsibility leave when his mother passed away and sick leave due to an injury sustained by the employee.
- [10] Mr Germishuizen testified that the client was not happy when the employee was not present for the aforesaid period, as the client pays service fees and expects the employee to be present on the premises, and the Applicant had to make alternative arrangements. Mr Germishuizen explained that there is not a pool of people from which the Applicant can pull to do the work in the absence of the employee and arrangements had to be made with other employees to go and work on site at Sterlitzia.

- [11] Mr Germishuizen explained that the employee's absence had financial and operational consequences for the Applicant as other employees had to be taken from other departments and operationally it impacted on certain portfolios. Financially, the Applicant had to refund the client for the employee's absence.
- [12] Mr Germishuizen confirmed that the employee was dismissed for gross insubordination in respect of his absence from work for six working days in August 2016 in that he ignored a direct instruction that he could not go on leave but did so regardless.
- [13] In cross-examination, Mr Germishuizen made it clear that the employee was entitled to the leave days as per his contract of employment and the issue was rather that he had to apply for leave and that it had to be approved before it could be taken. It was not for the employee to inform the employer that he is taking leave, whether or not it was applied for or approved. The issue was that at the time the employee wanted to take leave, the client was busy with a critical project, namely a full security upgrade, called Biometric Security System and the client wanted the employee to be available throughout the period of the project, which was from 15 – 22 August 2016. The system was installed and finalised on 19 August and was fully implemented from 22 August 2016. The project entailed the scanning of fingerprints and the client would have suggested that the employee take leave at an alternative date, but instead the employee just took the leave by informing the Applicant that he was going on leave. The issue was not the employee's entitlement to leave, but the fact that he took leave without permission.
- [14] Mr Germishuizen testified that it would have served no purpose to sit down with the employee to discuss the leave issue as he made it very clear in his e-mail that he was applying for leave and whether it was approved or not, he was taking his father to India. Even if the Applicant had asked him to stay, knowing the circumstances and the clients' needs at that particular time, the employee would not have stayed as he decided to take leave, no matter what.
- [15] The employee testified that his troubles started on 29 June 2016 when his mother was admitted to hospital and passed away shortly after she was discharged. He applied for compassionate leave of three days, during which

period he worked half a day to ensure that everything at work was in order. After his mother's passing and on 8 July 2016, he had to perform the last rites at the river and during this event, he fell. The employee went to the doctor and he was stitched up, but by Monday 11 July 2016, he was rushed to hospital, underwent surgery and was booked off for a period of two weeks. After this he went back to work.

[16] In August 2016, the employee received a distressed call from his father and he rushed home to find his father lying on the floor and unable to speak. He called the paramedics and his father was taken to hospital where X-rays were taken employee was told that his father had to be admitted as he needed urgent medical attention. As his father did not have a medical aid, they had to pay the hospital R 100 000 upfront and they were unable to afford the hospital. The doctor said that the employee should take his father to a public hospital or back to India where his doctor was.

[17] The employee testified that he had to take his father to India to receive medical attention as he could not afford a private hospital and did not want to take his father to a public hospital. He recently lost his mother and was too scared to take his father to a public hospital. He phoned Mr Michael and explained his situation and his testimony was that he begged for leave as he had just lost his mother and could not afford to lose his father too. Mr Michael swore at him and said that if he would go to India, he would be fired. Mr Michael refused to deal with the employee's request and told him to apply for leave from the human resources manager.

[18] On 15 August 2016, the employee contacted Ms Nicole Orchard, the human resources manager and he explained his situation to her and that Mr Michael said that he should contact her regarding his application for leave. Ms Orchard indicated that she would revert to the employee and when she had not done so by 17 August 2016, he followed up with her. He applied for leave due to his father's condition and the need to receive medical attention in India.

[19] On 17 August 2016 Ms Orchard indicated that the employee could not be granted leave because there was not sufficient staff to stand in for him at Sterlitzia and because the Applicant had already been very accommodating in granting him time off in unforeseen circumstances: referring to his mother's

passing and subsequent injury and sick leave. Ms Orchard indicated that operationally, the Applicant could not afford another two weeks' absence from the employee and she proposed that the employee's father be taken to a public hospital. The employee requested Ms Orchard to reconsider his request and he once again explained his situation and why his father could not be taken to a public hospital.

[20] Ms Orchard's response was that the Applicant was unable to grant the employee leave due to the fact that there was not sufficient staff to stand in for him.

[21] The employee's leave was finally denied and he testified that he got very upset and that on 18 August 2016 he told the Applicant that whether he was granted leave or not, he was taking his father to India. The employee did not want to put his father's life in jeopardy and he left on 24 August 2016 to take his father to India. He came back on 31 August 2016 and started working again on 1 September 2016.

[22] The employee had leave credits available at the time but was prepared to take unpaid leave. He testified that he was upset because he had explained his position to the Applicant and the reasons why he had to take his father to India and the refusal to grant him leave was unreasonable. He testified that the Applicant showed no compassion and at no point was there any attempt to discuss the issue with him. The Applicant's stance from the onset was that if he would go to India, he would be fired. The employee explained that he could not carry on begging for leave which was refused and at the same time putting his father's life in jeopardy.

[23] It is evident from the transcribed record that the employee was asked a lot of irrelevant questions which were unnecessary and did not take the case any further.

[24] In cross-examination the employee conceded that he was granted two and a half weeks' leave in July 2016. He also conceded that he was busy assisting with the fingerprints and the implementation of the Biometrics Security System. The employee worked on weekends to ensure that the Biometric Security System was implemented and he was busy with this when he

received the distressed call from his father on 13 August 2016. His father suffered from a heart condition.

- [25] The employee further explained that as his father's only son, it was his duty to accompany him to India.
- [26] The employee testified that before he left for India, he showed someone in the office what needed to be done, handed him his laptop and cell phone number to be able to contact him (the employee) should that be necessary. He also volunteered to work on weekends to get the work done.
- [27] The employee conceded that he took leave on his own accord and without permission. He further conceded that leave must be suitable to both the employer and the employee and that the employer has a discretion to grant it or not. His case is that the Applicant never understood his circumstances, never showed compassion and never requested a meeting with him to explain his circumstances to them. He however conceded that when he applied for leave he did not provide the Applicant with any information in respect of his father's condition and the reason why he had to go to India with his father.

The arbitrator's findings

- [28] In his analysis of the evidence, the arbitrator considered the fact that the employee was dismissed for gross insubordination and not unauthorised absenteeism.
- [29] The arbitrator recorded the definition of 'insubordination' as defined by the Labour Appeal Court (LAC) in *CWIU and another v SA Polymer Holdings (Pty) Ltd t/a Megapack*¹, as 'a wilful and serious refusal to obey a lawful and reasonable command or conduct by the employee which poses a deliberate and serious challenge to the employer's authority'. The arbitrator recorded the essential elements for insubordination as that, the order given should be lawful and the reasonableness of the order should be beyond reproach. To justify dismissal, it has to be shown that the employee deliberately refused to obey a reasonable and lawful instruction by the employer.

¹ (1996) 8 BLLR 978 (LAC).

- [30] The arbitrator recorded that the employee went on leave against the Applicant's order that he could not do so. He accepted that the employee's version that he needed to take his ailing father to India and that he was willing to take unpaid leave, was not disputed.
- [31] The arbitrator found that the instruction that the employee could not go on leave was unreasonable and callous, as the employee had just lost his mother when his father fell ill and his father was fearful of being admitted to a public hospital.
- [32] He further found that the employee was away from work from 22 – 31 August 2016, which was not inordinate. The Applicant failed to provide proof that it suffered financial loss due to the employee's absence in that the client demanded a refund. The arbitrator however accepted that the employee's absence disrupted the Applicant's operations, however this had to be juxtaposed with the employee's personal circumstances.
- [33] The arbitrator concluded that dismissal was not an appropriate sanction, as a written or final written warning would have sufficed and he found the employee's dismissal substantively unfair.
- [34] As already pointed out, the arbitrator awarded six months' compensation having considered the circumstances that led to the employee's dismissal, his length of service and his real and prospective loss of income.

Analysis: the grounds for review

- [35] I have to deal with the grounds for review within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

² 2007 28 ILJ 2405 (CC) at para 110.

[36] The LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*³ affirmed the test to be applied in review proceedings and held that:

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

[37] The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set aside the award. This piecemeal approach of dealing with the award is improper as the reviewing Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make⁴.

[38] The Applicant raised a number of grounds for review. The first ground for review is that the arbitrator displayed a clear bias in favour of the employee. This ground for review is unsubstantiated and in my view there is no merit in this ground for review. The gist of this ground for review is an attack on the findings the arbitrator made in favour of the employee and ultimately the finding that the employee was unfairly dismissed, rather than anything to support or substantiate allegations of bias. The fact that the arbitrator found in favour of the employee does not constitute bias and the Applicant did not place any facts before this Court to support its case that the arbitrator was biased.

[39] The remaining grounds for review all relate to the manner in which the arbitrator dealt with the evidence before him. The Applicant’s case is that the arbitrator failed to apply his mind to the evidence and as a result failed to draw rational conclusions from the evidence, that he failed to take into account material facts and failed to consider the totality of the evidence in determining the matter. The Applicant also takes issue with the fact that the arbitrator failed to consider whether dismissal was an appropriate sanction.

³ (2014) 35 ILJ 943 (LAC).

⁴ (2014) 35 ILJ 943 (LAC) at paras 18 and 19.

- [40] It is evident from the arbitrator's findings, that he was alive to the fact that in a case of insubordination, the order has to be reasonable and lawful and that the employee had to deliberately refuse to obey such a reasonable and lawful order. The arbitrator found that the employee went on leave against the Applicant's order, which order he did not find to be unlawful. The arbitrator found the order to be unreasonable because the employee had just lost his mother, who died after being admitted to a public hospital, his father fell ill and was fearful to be admitted to a public hospital and he needed to take his father to India.
- [41] The Applicant's case is *inter alia*, that the arbitrator failed to take into account material facts such as that the fact that the employee's leave applications were previously approved without difficulty, that the employee was absent from work for an extended period in July 2016, that he was the only dedicated person working at Sterlitzia and that the client expected him to be on the premises. More so during August 2016, when the client was busy with a security upgrade project that required the employee's presence and assistance. The arbitrator further ignored the reasons provided by the Applicant as to why the employee's leave for August 2016 could not be approved and he attached no weight whatsoever to this material fact.
- [42] The arbitration award is certainly not a handbook example of how an award should look like, but that is not the test on review. The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him.
- [43] I have already alluded to the fact that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set aside the award. This Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.
- [44] In summary: the arbitrator considered the fact that the employee had leave credits but was prepared to take unpaid leave, that he went on leave against the Applicant's orders and that his absence disrupted the Applicant's operations. On the other hand, the employee's absence was not inordinate, he

had to take his ailing father to India, the disruption of the Applicant's operations had to be juxtaposed with the employee's personal circumstances and in view of the employee's unfortunate and unplanned personal circumstances, the instruction not to go on leave was unreasonable and callous, wherefore dismissal was not an appropriate sanction as a written or final written warning would have sufficed.

[45] In considering whether holistically viewed, the decision taken by the arbitrator was reasonable, I perused the transcribed record, the arbitration award and considered the grounds for review raised by the Applicant. In my view the arbitrator considered the dispute before him namely whether the instruction given to the employee was reasonable and whether the employee's non-compliance therewith amounted to insubordination that warranted dismissal. I am satisfied that the arbitrator's findings are reasonable based on the evidence that was placed before him and there is no reason for this Court to interfere with it on review.

[46] It follows that the application for review stands to fail.

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

Order

1. The application for review is dismissed with no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms P Govender of Moni Attorneys

For the First Respondent: Ms A Davies of Johanette Rheeder Attorneys

LABOUR COURT