REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P621/2010

In the matter between:

SENQU MUNICIPALITY **Applicant**

And

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL and OTHERS **Respondent**

Heard: **3 February 2015**

Delivered: **27 March 2015**

Summary: Review. Incomplete record. Held that, in fact, record not incomplete.

Where bargaining council commissioner ignores relevant and material evidence; misconstrues relevant and material evidence; and takes account of speculative considerations in respect of which there is no evidence; cumulative effect rendering the conclusion reached in award so unreasonable that no reasonable commissioner could have reached the same conclusion.

Award reviewed and set aside and a decision substituted that the dismissal of the individual employees is fair.

JUDGMENT

EUIJEN, AJ

Introduction

[1] .This is an application in terms of Section 145 of the Labour Relations Act no. 66 of 1995 (the LRA), to review an award of the second respondent, a bargaining council commissioner (the Commissioner) in which he found the dismissal of the members of the third respondent (to whom I shall refer as the employees or the dismissed employees) to be unfair. The Commissioner consequently ordered the dismissed employees to be reinstated into the applicant municipality's employ, together with payment of six month's salary as compensation.

[2] The dismissed employees are all employed in the licence testing section of the applicant municipality. At their disciplinary hearing, they faced numerous charges of fraudulently issuing learner's; as well as temporary and permanent driver's licences, to members of the public who had not been tested and were not present at the testing station when the examiners certified their presence at the test in question. At the arbitration hearing held in terms of the LRA, the employer decided to limit its case to a single charge in the case of two of the dismissed employees, namely Mesdames Mabizela and Dada. The third dismissed employee, Mr Yalezo, faced 20 counts of issuing temporary driver's licences and receipts for payments to applicants who were not present at the testing station at the time, contrary to required procedures.

[3] The Commissioner found, in essence, in regard to the charges faced by Mesdames Mabizela and Dada, that another person, closely resembling the person to who the respective license was issued, must have attended the required test at the Barkley East testing station on the day in question on their

behalf. As far as Mr Yalezo is concerned, the Commissioner found that irregularities had been common-place at the testing station for some time, to the knowledge of the head of department, since these had been drawn to his attention by Mr Yalezo himself. The Commissioner accordingly found all three of the dismissed employees to be not guilty of the offences with which they were charged and ordered their reinstatement on the terms I have indicated.

[4] The test which this Court must apply in review applications of this nature is now well established by the Constitutional Court in the matter of *Sidumo and Another v Rustenberg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC);* as well as the Supreme Court of Appeal in the decision of *Herholdt v Nedbank Ltd [2013] 11 BLLR 1074 (SCA);* and in the Labour Appeal Court in the case of *Goldfields Mining SA (Pty) Ltd v CCMA and others [2014) 1 BLLR 20 (LAC).*

[5] That test is, in essence, as it was put in Sidumo:

"The question that must be asked is whether or not the decision or finding reached by the arbitrator is "one that a reasonable decision-maker could not reach". If it is an award or decision that a reasonable decision-maker could not reach then the decision or award of the CCMA is unreasonable and therefore reviewable and liable to be set aside."

[6] On this test, as emphasized in the Supreme Court of Appeal's decision in *Herholdt*, the reasons given by the arbitrator assume less importance, unless it can be said that it renders the conclusion reached via those reasons unreasonable within the meaning of the passage in Sidumo which I have just read out. (Herholdt at 1080 para [12])

[7] The dismissed employees have also raised a point *in limine* in these proceedings that the record is incomplete and that for this reason alone, the application ought to be dismissed, or if successful, not decided by this Court, but referred back for a re-hearing before a different commissioner. They also seek condonation for the late filing of their answering affidavit. These issues are considered at the outset.

Condonation

[8] The review application was served on 15 November 2010, within the time periods prescribed by the LRA. The supplementary affidavit in terms of rule 7 A (8) was served on 21 April 2011. The answering affidavit was only served on 29 May 2012, which is the approximately 1 month late. The principal explanation advanced for this delay is that the review application was originally served only on the union (SAMWU) and not the individual employee's. This contention is true. However, it is of little significance since on 1 December 2010 the dismissed employees advised that they had withdrawn their mandate given to the union to appear on their behalf and instead appointed Mili attorneys of Grahamstown. Those attorneys admit that they were in possession of the review application by 13 April 2012, as they uplifted a copy from the court file. They ought to have been in a position to file the answering affidavit timeously.

[9] There is no explanation at all from the attorneys why the answering affidavit is late. Doubtless the length of the record has something to do with it, but this is not stated to be the case. Nevertheless and since heads of argument have been filed on behalf of the dismissed employees and serious submissions have been advanced at least about the state of the record, I consider it in the interests of justice for condonation to be granted and that the matter proceed on an opposed basis.

Incomplete Record

[10] The submission on behalf of the dismissed employees that the transcript of the evidence led at the bargaining Council hearing is incomplete, is based solely on the transcriber's certificate which accompanies the transcript of the

evidence. That certificate notes that there was one blank tape; that cross examination of one of the witnesses, Ms Trompeter, ended abruptly; and that there are a number of instances during the evidence of Xhosa speaking witnesses, (particularly the dismissed employees), where they give their answers in isiXhosa and this is not translated.

[11] Although this issue is raised in the answering affidavit, no further particularity than that stated above is provided. In particular, it is not noted which portions of the record are identified as deficient; neither do any of the dismissed employee's say in what respects their case has been prejudiced, or what evidence is missing from the transcript which could influence the outcome of these proceedings. This was supplemented in argument, to some extent, by Mr Simoyi, who appeared on behalf of the dismissed employees, who provided me with references to the evidence of one of the dismissed employees, Ms Mabizela, where it is noted that her answers are given in isiXhosa, without a translation provided. He submitted that similar instances are to be found in the evidence of the other two dismissed employees too.

[12] It does not seem that the untranscribed (blank) tape is of significance, since it is not obvious that any substantial portion of the record is missing. It seems to be a tape that was just not used. As far as Ms Trompeter's evidence is concerned, there is no indication at all that her cross examination was cut short. On the contrary, she was extensively cross-examined both by Ms Mabizela, as well as the union official Mr Jika. If anything, the portion of her evidence which has not been transcribed is re-examination, which can only prejudice the applicant's case and not that of the dismissed employees.

[13] This leaves the allegation that many of the dismissed employee's replies during their evidence were given in isiXhosa and not translated. I have considered the references to the transcript given to me by Mr Simoyi and I have also read the transcribed evidence of the three dismissed employees. It is true that particularly during Ms Mabizela's evidence, there are a number of instances where she answers in isiXhosa and her answers are not translated. It is also clear that the Commissioner understands isiXhosa and on each occasion he will either ask a follow-up question, or seek clarity about the

answer given. These follow up questions convey the essence of the untranslated portion of the answer. On other occasions, the Commissioner simply instructs the interpreter to interpret the answer, which is then done, as is the case in the portion of the evidence of Ms Bongwana, to which I was also referred.

[14] Neither Ms Dada, nor Mr Yalezo lapse into isiXhosa, with the same frequency as Ms. Mabizela. When they do, the Commissioner is alive to the prejudice which this causes the applicant municipality's representative, Mr Terblanche, who does not understand isiXhosa. The Commissioner's practice, as happens throughout the arbitration hearing, is immediately to ask a further question to clarify the untranslated answer given. From the question asked by the Commissioner in clarification, the essence of the untranslated answer itself becomes apparent.

[15] I conclude that the deficiencies in the record, such as they are, are not so serious as to make it impossible to render a fair and just decision on this review application.

The Commissioner's Award

[16] The case against the dismissed employees is based on an investigation by the Special Investigation Unit (SIU) which was triggered when it was noticed that the applicant municipality was issuing more drivers' licenses per month than the population of the district warranted. During that investigation, the home of a certain Mr Mawa Fezi, who runs a driving instructor's school, was searched and a number of incomplete original learners and temporary driver's licenses were discovered, which were traced as issued by the applicant municipality. It needs be mentioned that it was common cause at the arbitration hearing that the said Mawa Fezi is romantically involved with one of the dismissed employees, Ms Mabizela.

[17] Two of the documents which were discovered at the home of Mawa Fezi, were traced as issued by two of the dismissed employees, namely Mesdames Mabizela and Dada. In the case of Ms Mabizela, this was a temporary driver's license issued to Ms Bongwana from Port Elizabeth on 20 March 2009. In the

case of Ms Dada, an incomplete learner's license issued by her to Ms Maki-Plaatjies on 11 December 2008 was also found at Mawa Fazi's home.

[18] Both Mesdames Bongwana and Maki-Plaatjie gave evidence. Both testified that they paid Mawa Fezi to obtain their respective licenses for them, without undergoing any official test. In the case of Ms Mabizela, she paid Mr Fezi R1 500,00 and a further R 2500,00 to Ms Mabizela, at a later stage. Ms Maki-Plaatjie paid R1 000,00 to Mr Fezi. Both testified that they never attended at the applicant municipality and were given their licenses later by Mr Fezi. Significantly, in the light of the Commissioner's findings, neither stated that they requested or knew anything about another person being sent to write or undertake the test on their behalf. None of this evidence was pertinently challenged by the dismissed employees.

[19] The SIU investigator, Mr Allie, also testified that he investigated the records of the applicant municipality and could find no record of Ms Bongwana's attendance at the testing centre on the day she is alleged to have passed her test, namely 13 March 2009. In the case of Ms Maki-Plaatjies, her name was reflected on the attendance register for 11 December 2008, but there were material discrepancies between the copy of the learner's license held at the municipality and that in Ms Maki-Plaatjie's possession, that led him to believe that these documents had been fraudulently manufactured at the municipality.

[20] In his award, the Commissioner ignores or misconstrues completely, the import of the above evidence. In the first instance, he does not consider the significance at all of the complainants' testimony that they had bribed an official and/or her partner not to take the test. Secondly, the Commissioner fails to consider that it was no part of the arrangement that anyone else take the test on their behalf; simply that they be issued with the relevant license for payment of a fee.

[21] The Commissioner also fails to appreciate the irregularity and significance attendant upon the discovery of incomplete official documents at the home of Mawa Fezi, when these ought not to leave the testing centre in that state. Coupled with the fact that when compared with the documents at the testing

centre itself, (or the absence thereof in the case of Ms Bongwana) they cast further doubt on the authenticity of such documents.

[22] The Commissioner also embarks upon a speculative examination as to why one of the employees implicated in what must have been a conspiracy amongst virtually all of the testing centre employees, Mrs Buys, was allowed to take early retirement rather than be charged along with her colleagues. He concludes that this casts doubt on the reliability of the SIU investigation. There was no evidence at all about the involvement of Mrs Buys, or the employer's reasons for not taking disciplinary action against her, since inconsistency was not an issue at the arbitration proceedings. More glaringly, this is the decision of the employer and has no bearing on the SIU investigation. This influences the Commissioner's findings about the reliability of the SIU investigation, without any material or relevant justification for doing so.

[23] The Commissioner also finds that the employer did not disprove Ms Mabizela's version that another person must have taken the test on Ms Bongwana's behalf, because the employer did not provide the entire attendance book for that period at the arbitration. This ignores the evidence of Mr Allie that during his investigation he did not come across any such documentary evidence. Were there documentary evidence to disprove Mr Allie's statement, the dismissed employees had an evidentiary burden of providing it, not the employer, as erroneously held by the Commissioner. In the event, it does not appear that any such request was made for this document.

[24] Finally, the Commissioner has no regard for the inherent improbability of Mesdames Mabizela and Dada's version that both had mistakenly tested a look-alike, sent to undertake the test on another's behalf. All applicants for these tests have to produce their identity documents for verification, as well as affix fingerprints to the issued documents. In these circumstances, it is virtually impossible to mistakenly test a different person to that represented in the identity document.

[25] For all of the above reasons, I determine that the Commissioner's conclusion, upholding the version of Mesdames Mabizela and Dada that they must have tested someone else, mistakenly but *bona fide*, to be grossly unreasonable and so at variance with the evidence led and probabilities considered above, that no reasonable commissioner could reach such a conclusion. It follows that the Commissioner's conclusions in respect of these two employees cannot stand and must be reviewed and set aside.

[26] This leaves the case of Mr Yalezo. His case is on a different footing as he effectively admitted his guilt on the charge which he faced, but stated that this was common practice at the testing centre, which he had previously drawn to management's attention.

[27] In his case, the Commissioner fails to appreciate that because of the checking systems in place at the testing centre, the dismissed employees had to act in concert in order for their scheme to work. Hence Mr Yalezo, as the cashier, was an essential cog in this machine, since he had to take money and issue an official document to a person who was not there. Hence there could not simply be an innocent explanation for his participation in the admitted irregularities that he was part of perpetrating at the testing station. Nor could he have been unaware of them.

[28] For all of the above reasons, In my judgment, the result reached by the Commissioner that the dismissal of the three individual employees was unfair is so at variance with the evidence led before him and the probabilities that emerge from such evidence, that no reasonable commissioner could possibly reach such conclusion. It follows that I am satisfied that the applicant has made out a case for the award to be reviewed and set aside.

Conclusion

[29] In my judgment, the guilt of all three of the dismissed employees, on the charges which they faced, is firmly established on a balance of probabilities on the record before this Court. There is accordingly no purpose to be served in referring the matter back to be decided afresh by another commissioner.

[30] As far as costs are concerned, it is true that the dismissed employees have held out to the very end in maintaining their innocence in circumstances where this was not warranted. At the same time, the errors which have been committed and which have led to the applicant's success in these proceedings, have been committed by the bargaining council commissioner. In these circumstances, it seems to me fair and just not to make any award as to costs.

Order

[31] I grant the following order:

a. The late filing of the answering affidavit is condoned.

b. The award of the bargaining council commissioner issued under case no. ECD 011001, dated 22 October 2010, is reviewed and set aside.

c. The award of the Commissioner is substituted with the following:

"The dismissal of the applicants is substantively fair.

Their referral of an unfair dismissal claim to the bargaining council is dismissed."

d. There is no order as to costs.

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TMG Euijen

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv M Grobler

Instructed by: Kirchmanns Inc

For the Respondent: Adv Simoyi

Instructed by: Mlonyeni Lesele Inc.