



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable/ Reportable

Case no: PR 49/2012

In the matter between:

COLVEN ASSOCIATES GEORGE CC

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

JONATHAN R NO

Second Respondent

ROBOJI NE

Third Respondent

Heard: 21 April 2015

Delivered: 22 April 2015

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner found that the third respondent had been unfairly dismissed by the applicant, and awarded her compensation equivalent to eight months remuneration.
- [2] The facts giving rise to the proceedings under review are not contentious and I do not intend to burden this judgment with the repetition of the factual background. It suffices to say that the third respondent was dismissed for failing, despite numerous requests, to comply with an instruction to undergo a polygraph test during September 2013. That instruction was given by the applicant in circumstances where it had received information from a client to the effect that certain of its employees were engaged in bribery, in the form of selling jobs. It is not in dispute that it was a term of the third respondent's contract of employment that she undergoes a polygraph test when required by her employer to do so.
- [3] The applicant's grounds for review relate primarily to the conduct of the commissioner. In particular, it is contended that he failed to appreciate (and hence properly consider) that the reason for the third respondent's dismissal was her failure to carry out a reasonable and lawful instruction, that he irrationally concluded that the applicant's witness Esterhuizen was not credible, that he failed to have regard to other arbitration awards that supported the applicant's case and that he acted irrationally in awarding the quantum of compensation that he did.
- [4] I am not persuaded that there is any merit in the last of these grounds – although the third respondent during the course of opening statements requested the equivalent of three months compensation in the event of the commissioner finding in her favour, by the time that the proceedings concluded more than a year had elapsed. The commissioner clearly took this into account, as he was

entitled if not obliged to do, in deciding on an appropriate amount of compensation on the basis of the period for which she had been unemployed.

- [5] I am persuaded though that the first three grounds for review have merit. Despite the commissioner recording that the third respondent's dismissal was a consequence of her refusal to comply with a reasonable and lawful instruction, it appears from the face of the award that he lost sight of the true reason for dismissal and concerned himself instead with the question of whether or not the third respondent was guilty of the misconduct being investigated by means of the polygraph examination (i.e. the allegation of bribery). This much is apparent at number of points both in the record and in the award. The commissioner's reasoning is particularly apparent from paragraph 23 of the award, which reads as follows:

I however accept that the applicant has breached the terms and conditions of employment by refusing to subject herself to an agreed polygraph test but the question is whether the misconduct is dismissible. It is generally accepted the polygraph test is a tool to investigations but is not conclusive evidence without corroborative evidence of a person's guilt due to the nature of a polygraph test,

- [6] Further, paragraphs 24 and 25 read follows:

24. But, despite the application of the contract, it is similarly my view that her refusal i.e. the mere refusal to undergo a polygraph test, while it might be a form of breach of contract, or possible insubordination, similarly does not in itself justify the conclusion that such a person can no longer be trusted. This, in my view, is unfair.

25. The respondent did not hold an investigation. It chose, rather, to limit its enquiry to the polygraph and the failure to undergo the test to conclude that the applicant cannot be trusted. This, in my view, renders the dismissal of the applicant substantively unfair.

- [7] These conclusions indicate that the commissioner misconceived the nature of the enquiry before him. In terms of the Code of Good Practice: Dismissal, the

commissioner was required to establish whether the third respondent had contravened any workplace rule or standard and if so, the reasonableness of the rule, the employee's awareness of the rule any breach of the rule and whether dismissal was an appropriate sanction. The terms of the award fail to demonstrate that the commissioner carried out the enquiry in these terms – his conclusions are indicative of an enquiry of an entirely different nature, more particularly the nature of the polygraph test and the evidentiary value of its results.

- [8] I did not understand the third respondent's representative to contest these submissions, nor did she dispute that the credibility finding made by the commissioner in respect of the applicant's witness Esterhuizen was unsustainable. The commissioner had concluded that Esterhuizen's evidence that the informant who sent him an email which implicated certain of the applicant's employees in bribery did not supply him with the names of the employees concerned was not credible, despite the fact that this proposition was never put to him during the course of his evidence and despite his own evidence to the contrary.
- [9] The primary submission made by the third respondent's representative during the course of argument was that the commissioner's decision was reasonable and therefore sustainable in relation to the question of sanction. By this I understood her to mean that despite the commissioner's evaluation of the evidence and the shortcomings that form the subject of the applicant's grounds for review, the commissioner's decision that dismissal was not an appropriate sanction for the misconduct committed by the third respondent falls within the band of decisions to which reasonable decision-makers could come on the available material.
- [10] In my view, there is no merit in this submission. First, the award under review discloses no consideration of any of the elements identified by the Constitutional Court in the *Sidumo* judgment as relevant to this enquiry (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC)). That judgment requires a commissioner to come to a decision that is fair in all the

circumstances, having regard to the interests of the employee and of the employer. There is simply no basis articulated in the award under review for the finding to the effect that the applicant's dismissal was substantively unfair, but for his finding that the applicant failed to conduct an investigation (which is not correct) and chose to limit its enquiry to the polygraph and the failure to undergo the test to conclude that the applicant cannot be trusted (which is precisely the case disclosed by the evidence), or why dismissal was too harsh a penalty for misconduct that the commissioner had found to have been committed.

- [11] The basis on which this court is entitled to interfere with an arbitrator's decision in proceedings such as the present is fairly well established. The *Sidumo* judgment (*supra*) obliges this court intervene if and only if the decision made by a Commissioner is so unreasonable that no reasonable decision-maker could come to that decision. That decision and those that followed it (in particular, *Herholdt v Nedbank* [2013] 11 BLLR 1074 (SCA) and *Goldfields Mining South Africa v CCMA & others* [2014] 1 BLLR 20 (LAC)) do not discount the conduct of a commissioner from the relevant enquiry. The courts have held that in addition to a failure by a commissioner to apply his or her mind to issues which are material to the determination of the case, an applicant must demonstrate that the commissioner misconceived the true nature of the enquiry, or that his or her conduct resulted in an unreasonable outcome. The LAC has held further that whether or not a decision is unreasonable in its result is an exercise that is necessarily dependent on variable considerations and circumstantial factors. In other words, flaws in the reasoning of the commissioner, evidence of a failure to apply the mind, reliance by the commissioner on irrelevant considerations or the ignoring of material evidence must be assessed with the purpose of establishing whether the arbitrator has undertaken a wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. These lapses and irregularities ought to be of such an order as to result in a misconceived enquiry or a decision to which no reasonable decision-maker could come on the available material. (see *Head of the Dept of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC)).

- [12] In the present instance, as I have indicated, the commissioner undertook the enquiry to be conducted by him in the wrong manner. Put another way, he asked the wrong question. The question before him was whether or not the third respondent unreasonably refused to comply with a reasonable instruction, and whether dismissal was an appropriate sanction for her failure to do so. Instead, he conducted an enquiry into whether the employee was guilty of the charge being investigated, the failure to undergo a polygraph test in that context, and its effect on the third respondent's employment more generally. In my view, on the available authority, the award stands to be reviewed and set aside. Even if I am wrong in coming to this conclusion, I am satisfied that the commissioner's conduct, particularly in relation to his unsustainable findings of credibility and therefore his dismissal of relevant evidence and his failure to have regard to the relevant authorities submitted to him (all of which indicate a conclusion contrary to the decision to which the commissioner came), had the result that the conclusion to which he came was unreasonable.
- [13] The applicant's representative submitted that should the court uphold the review, the court ought to substitute its decision for that of the commissioner. I am in agreement with this submission, given the lapse of time since the award was issued and the completeness of the record. It is not disputed that the applicant had some six years' service at the time of her dismissal. It is not in dispute that it was an express term of her employment that she undergoes a polygraph test when so required. It is also not in dispute that the third respondent refused to undergo a polygraph test, that she was warned of the consequences of a continued refusal and that, to the point of the conclusion of the arbitration proceedings, she failed to proffer any rational explanation for her refusal. Finally, the penalty prescribed by the applicant's disciplinary code was that of dismissal – there could have been no doubt in the third respondent's mind that her continued refusal to comply with a repeatedly issued instruction would have that consequence.
- [14] The applicant's representative (charitably) did not pursue an order for costs.

I make the following order:

1. The arbitration award issued by the second respondent under case number ECPE 4314/12 dated 7 April 2013 is reviewed and set aside.
2. The award is substituted by the following:
“The applicant’s dismissal was substantively and procedurally fair.”
3. There is no order as to costs.

Andre van Niekerk

Judge

REPRESENTATION

For the applicant: Mr. C Kirchman, Kirchman’s Attorneys

For the third respondent: Ms E van Staden, Legal Aid SA