IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: C912 & 871/15

In the matter between:

SANTAM LIMITED **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER L.O. MARTIN **Second Respondent**

KOOGANASEN THEO PILLAY **Third Respondent**

Heard: **15 February 2017**

Delivered: **6 June 2017**

Summary: The finding that the third respondent is guilty as charged is not supported by the evidence thus reviewable. A finding that reinstatement as the primary remedy is not available to the third respondent is not consistent with the provisions of section 193(2) of the Labour Relations Act 66 of 1995 thus reviewable. The award of the second respondent is not one that a reasonable commissioner can arrive at. Held (1) The

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first review is dismissed. Held (2) The award issued by the second respondent is hereby reviewed and set aside. It is replaced with an order that the dismissal of the third respondent is procedurally fair but substantively unfair. Santam Limited is ordered to reinstate the third respondent without loss of benefits. Held (3) Each party is to pay its own costs.

JUDGMENT

MOSHOANA AJ

Introduction

[1] There are two review applications that were enrolled to be heard in one day. The first review is brought by Santam Limited (Santam). In the first review, the arbitrator found that the dismissal of the third respondent was substantively unfair on the basis that dismissal as a sanction was not justified. Santam is seeking to overturn that finding. At the same time, the third respondent seeks to overturn the finding of guilt. He brought a cross review. The second review is launched by the third respondent seeking to challenge a finding that Santam did not commit an unfair labour practice in relation to promotion. Both reviews are being opposed. This judgment will relate to the two review applications.

Background facts

[2] The third respondent commenced employment with Santam on 1 July 2008. On 16 September 2014, after a disciplinary enquiry, he was dismissed. Prior to his dismissal, in June or July 2013, he was appointed as caretaker of the Project Management Office (PMO). At some stage, one Mr Jan de Klerk (De Klerk) mandated the third respondent to pursue

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a strategy of aligning the functions of the PMO and the Project Portfolio Office (PPO). According to the third respondent the mandate was clear and simple. It entailed that the smaller PPO would merge into the larger PMO thereby creating the EPO, effective 1 June 2014. The Head of PMO would the head this merged capability. According to Santam, the mandate was subject to a buy-in by the leadership of the Business Change Unit (BCU).

[3] A body called Optimization Forum (OF) was formed, which comprised of business change representatives, the third respondent and Mr Johan Etsebeth to discuss the merger of the two units. The OF met on a regular basis. In December 2013, the third respondent signed a contract to become the permanent head of the PMO. During February 2014, the third respondent was advised to put on hold the aligning of PPO and PMO. The advice was brought about by the restructuring that Mr Kevin Wright (Wright) had put in place which would eventually lead to the merging of PPO and PMO. On 13 May 2014 the third respondent was advised of a decision to amalgamate PMO and PPO and that the position of the head of the amalgamated unit would be advertised internally. He was at liberty to apply for the position.

[4] The third respondent was not pleased by this decision as he had an expectation that he would be appointed to that position outright. He participated in the recruitment process under protest. On 19 July 2014, the third respondent was advised that he had not been successful in his application for the position. One Ms. Marelize Visser (Visser) was the successful candidate. The third respondent lodged a grievance, staking a claim that the position was promised to him. On 1 July 2014, the appointment of Visser, as the head of Portfolio Management Centre (PMC), was announced through an email. On 2 July 2014, the third respondent responded through an email. He amongst others mentioned that he objects to the announcement since his grievance was not finalised yet.

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[5] On 31 July 2014, the third respondent referred an unfair labour practice dispute. He alleged that the conduct of Santam was unfair in failing to promote him to the position of manager of PMC. Pursuant to his email of 2 July 2014, the third respondent was charged with an act of misconduct. According to Santam, the third respondent was dishonest when he stated to the recipients of his email that the current employment contracts have been unilaterally terminated. The third respondent was found guilty and dismissed. Aggrieved by his dismissal, he referred a dispute alleging unfair dismissal. The two disputes, one for unfair labour practice and the one for unfair dismissal were consolidated. The arbitration ran for a number of days. It ran for 18 days to be exact. On 7 September 2015, the second respondent rendered his award. In relation to the unfair labour practice, the referral was dismissed. Regarding the unfair dismissal dispute, the second respondent found that the dismissal was procedurally fair but substantively unfair and ordered compensation equivalent to six months' salary. As pointed out above, both parties were aggrieved by the award and launched separate review applications, which were heard together.

Grounds for the first review

[6] Santam contends that the second respondent misconceived the enquiry he had to conduct. He overturned a dismissal for dishonesty on the basis that the third respondent had a clean record. The award is not one, which a reasonable commissioner can arrive at. Further, it was contended that the award is completely irrational as being inherently contradictory. It lacked truth in some respects.

Grounds for the second review

[7] The third respondent contends that the evidence does not justify the findings, thereby; the second respondent committed gross irregularities and exceeded his powers. He gravely misunderstood the evidence. He considered evidence in an extremely selective manner, glossed over important testimony and considered the evidence in a piecemeal fashion

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as opposed to a holistic view. He failed to apply documentary evidence and recordings. On the unfair labour practice dispute, the applicant largely criticized the findings made by the second respondent. He, in a sense, attempted to show that there was evidence of express promise made by De Klerk, which the second respondent found to be lacking and insufficiently supported. He, to a large extent, criticized every finding made by the second respondent in a manner that mimics an appeal.

[8] On the unfair dismissal dispute, again, the third respondent somewhat styled his attack in an appeal manner. Properly considered, the third respondent simply contends that the evidence presented did not support the finding that he disseminated false information in his email of 2 July 2014. He also challenged the procedural fairness finding. In that regard, he again raised a number of issues relevant to the disciplinary code and failures of the chairperson to make certain disclosures.

Evaluation

[9] The test for review is by now settled. A finding must be one that falls within the bounds of reasonableness. Given the view I take at the end; it is convenient to commence with the second review. I have carefully considered the analysis by the second respondent in relation to the alleged unfair conduct in relation to promotion. The gravamen of the third respondent's case is that De Klerk promised him the position. This being a review and not an appeal, I need to ask myself only one question. Is the award one that a reasonable decision maker will not arrive at?[1] Certainly the award of the second respondent with regard to the unfair labour practice allegations falls within the bounds of reasonableness.

[10] The third respondent was given a fair opportunity to contest the position. There was no evidence to support the allegation that De Klerk promised

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 110. (*Sidumo*)

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him the position. Strange enough, the third respondent lodged a grievance only after he was advised that he was not successful. Only at that stage did he raise the issue of De Klerk promising him the position. Wright testified that he telephoned De Klerk who refuted the allegations. Accordingly, I am unable to find any basis in law to suggest that the finding that there is no evidence of express promise – is not supported by evidence. Therefore, I conclude that the third respondent's review application in this regard must fail.

[11] Turning to the unfair dismissal dispute, I conclude that the finding that the dismissal was procedurally fair is unshakeable. The evidence showed that the third respondent was given timeous notice. He was afforded an opportunity to be heard, call witnesses and cross-examine witnesses. All of this sums up fairness in terms of process. With regard to substantive fairness, the issue is whether the third respondent was guilty of the misconduct that led to his dismissal. The third respondent faced two offences.[2] The third respondent was cleared of complaint 2 and the alternative. Therefore, the dismissal of the third respondent was based on complaint 1. In order to justify the dismissal, Santam was obliged to prove that the third respondent is guilty of distributing false and misleading information.

[12] The email of 2 July 2014 is critical in this regard. It is common cause that the email was distributed to a number of recipients. It is a duty of an arbitrator to enquire into the guilt or otherwise of an employee dismissed on account of misconduct. The second respondent was supposed to determine whether the information as distributed was false and misleading. Santam contended that the false and misleading part of the email was the following:

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[2] These were:

Complaint 1: Distributing false and misleading information.

Complaint 2: Conduct unbecoming of a manager by breaching the code of ethics.

Alternatively, inappropriate and or unprofessional conduct.

> "3 In my role as Head of the PMO and acting on behalf of the 19 employees, I'm responsible for, I believe you have a legal and ethical duty to inform all the Portfolio Management Centre employees that they have accepted, with the appointment of Marelize Visser, that this "restructure" is valid and all their current employment contracts have been unilaterally terminated by Business Change management with immediate effect and in terms of section 189 of the Labour Relations Act (as I was advised by Kevin Wright and Maarten Van Der Walt)."[3]

[13] What is clear from the above quotation is that regarding termination in terms of section 189 of the Labour Relations Act,[4] the third respondent was relaying what he heard from Wright and Van Der Walt. Instead of finding that the third respondent was not so advised, he finds that the third respondent misinterpreted the reference to section 189 by Wright during the grievance meeting. He accepted that in the said meeting Wright did refer to section 189 in a hypothetical sketch. At arbitration, Wright was requested to comment on the email of the third respondent. All he stated was that the statement is bizarre and crazy.[5] The transcript of the grievance hearing reflects that he said to the third respondent that— "*here is a section 189. I am telling you you are affected and here is a new structure applied*".[6] He mentioned all of that in reply to the question: "what happens to Theo (third respondent)?" At this point in time it was already announced that Visser had been appointed. Wright mentioned to the third respondent that Visser was entitled to restructure the unit and if she did, there may be fewer positions to which employees may have to apply.[7]

[14] If the third respondent understood Wright to mean that Visser was entitled to restructure and terminate in terms of section 189, then what he

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[3] Page 373 of the Arbitration Record.

[4] 66 of 1995, as amended.

[5] Page 2163 of the Transcript lines 1-12.

[6] Page 2160 of the Transcript lines 5-7.

[7] Page 2159 of the Transcript lines 20-25 and 2160 lines 1-5.

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conveyed in the email cannot be false and misleading. It is important to note that having understood Wright to mean termination, he believed that there was a legal and ethical duty to inform all the Portfolio Management Centre employees. The second respondent found that the third respondent knowingly disseminated false information on the strength of the concessions the third respondent made during arbitration. As I see it, the third respondent was not simply making a statement, he was stating what he understood Wright to be conveying at the grievance meeting. As the third respondent testified, he understood that upon appointment of Visser, termination in terms of section 189 would follow. It was only at arbitration that Wright explained what he meant at the time. The concessions to which the second respondent based his conclusions that the third respondent knowingly disseminated false information relates to the fact that at the stage of the announcement of appointment of Visser, he was aware of the fact that the process of restructure of Santam would not involve the dismissals of anyone and no one's role had been terminated. Such, to my mind, does not demonstrate that Wright did not say what he said at the grievance meeting and understood by the third respondent in the manner he understood him at that time.

[15] The onus does not shift. It is Santam's onus to prove that the information as recorded in the email is false and misleading. To my mind, the finding that the third respondent disseminated false information is not consistent with the evidence, particularly that of Wright. An award that is not consistent with the evidence cannot be one a reasonable decision maker can arrive at.

[16] Even if I were to accept that the finding of guilt is supported by evidence, I have difficulty in understanding the reasoning to deny the third respondent the primary remedy. Section 193 (2) is very specific.[8] If any

[8] Section 193(2) provides:

> "(2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless—
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> (a) the employee does not wish to be re-instated or re-employed;

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of the situations mentioned in the section do not present themselves then reinstatement must be ordered. It is unclear to me whether the second respondent, by refusing reinstatement, was revoking the provisions of section 193(2) (b) or what? All he says in his award is that he finds it better that the parties part ways on account of the third respondent's resentment for the respondent's management – built up over a duration of his sojourn with the respondent – as stated by him at the meeting of 13 May 2014. For the provisions of section 193(2) (b) to be invoked there must be evidence from the employer party to demonstrate that continued employment would be intolerable. Absent that, the section cannot be invoked. It is apparent that such evidence was not led hence reliance on the resentment as stated in the meeting of 13 May 2014. It ought to be borne in mind that the intolerability of continued employment must be caused by the misconduct that led to a dismissal. As at 13 May 2014, the misconduct that led to the dismissal of the third respondent was not committed. Therefore, taking into account what happened on 13 May 2014 evinces failure to apply mind. It is an irrelevant consideration.

[17] Given the view I take, the finding that the third respondent was guilty is not supported by the evidence renders the first review academic. For good measure and taking into account what I stated in the preceding paragraph, I should briefly deal with the first review. It is the duty of the second respondent to consider the fairness of a dismissal using his own sense of fairness and not deferring to the employer.[9] It is indeed so that

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(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure."

[9] *Sidumo* at para 79 where the Court held:

"To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

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an arbitrator is not at large to consider the sanction of dismissal afresh. All he or she is required to do is to consider whether the dismissal as imposed by the employer is fair or not.[10] In this matter, the second respondent did not simply substitute the sanction of Santam. In applying his own sense of fairness, he considered the evidence of Wright who sought to explain why Santam imposed the sanction of dismissal. Wright, in his evidence, suggested that if Santam were unionized, then there would have been prejudice. He concluded that the results of the email could have been cured if there was any potential prejudice. In truth it would have been easier if Wright and Van Der Walt had responded to the mail and refuted the allegation that they told the third respondent that the contracts had been terminated. I do not find any basis in law to interfere with the second respondent's own sense of fairness. The conclusion he reached on the sanction is not one that a reasonable commissioner could not reach.

Conclusions

[18] In summary, it is my finding that the first review must fail. The second review fails in so far as it seeks to attack the unfair labour practice findings. Therefore, the award of the second respondent ought to be reviewed and set aside. I am in a position to replace the award with an order of this Court. All the relevant evidence is before me and I am in a better position to consider the dispute.

Order

[19] In the results, I make the following order:

1. The first review application is dismissed.

2. The award issued by the second respondent is hereby reviewed and set aside. It is replaced with an order that the dismissal of the third respondent is procedurally fair but substantively unfair.

[10] Id.

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Santam Limited is ordered to reinstate the third respondent without loss of benefits.

3. Each party is to pay its own costs.

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G Moshoana

Acting Judge of the Labour Court of South Africa

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Appearances

For the Applicant:	Adv. F Rautenbach
Instructed by:	Maserumule Inc, Cape Town
For the Third Respondent:	In Person

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