REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Judgment

Not reportable

Case no.: D431/12

In the matter between**:**

DEPARTMENT OF HEALTH, KWAZULU NATAL **Applicant**

and

AHMED SALEEM SEEDAT **First Respondent**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORIAL BARGAINING COUNCIL **Second Respondent**

BHEKINHLANHLA STANLEY MTHETHWA **Third Respondent**

HEARD: **22 July 2014**

DELIVERED: **20 November 2014**

SUMMARY: **Application to Review and set aside**

an award i t o Section 145 of the LRA

JUDGMENT

MAESO AJ

Factual background

[1] The Applicant seeks to view the Third Respondent's award dated 10 April 2012 reinstating the First Respondent.

[2] The Third Respondent found that the First Respondent's dismissal to be both substantively and procedurally unfair. The Applicant was ordered to reinstate the First Respondent into his former position with effect from the date of his dismissal on terms and conditions of employment applicable to the First Respondent prior to his dismissal.

[3] The First Respondent was dismissed following a disciplinary enquiry at which he was charged with submitting fraudulent subsistence and travelling claims ("SNT claims") over a certain period.

[4] It was common cause that the First Respondent completed parts of the claim form ("SNT form") in respect of work related travel undertaken in a privately owned motor vehicle.

[5] The First Respondent's version, which was not challenged during the arbitration, was that he only completed sections of the SNT form that required his personal details together with a description of his motor vehicle. He described his car as a BMW 318i with an engine capacity of 2.8 litres. It is this last point that caused the Applicant to charge the First Respondent with submitting fraudulent SMT claim forms.

[6] It was not disputed that the First Respondent also recorded the number of kilometres travelled on the SNT form but that the tariff allocated to the distance travelled and the amount due to the First Respondent, were completed by other employees.

[7] It is also common cause that when completing the information described above, the First Respondent would sign the SNT form confirming that the

travel was for official purposes and that the claims are in accordance with the rates authorised in respect of his motor vehicle. However, the First Respondent denied that he had any knowledge of these rates.

[8] It is also common cause that all the SNT forms submitted by the First Respondent were approved by the head of the component and the head of the department.

[9] A forensic report concluded that had the First Respondent claimed for a vehicle with a 1.8 engine and not a 2.8 engine as recorded on the SNT form, the total amount claimed by the First Respondent during the relevant period would have been reduced by R1741.72.

[10] It is common cause that the First Respondent had 19 years service with the Applicant and that prior to this incident he had an unblemished disciplinary record.

[11] The Applicant contends that it is unreasonable for the Third Respondent to find on the evidence placed before him, that it was unfair to conclude that the First Respondent's conduct "displayed fraud or dishonest intent".

[12] The Applicant submits that it is unreasonable for the Third Respondent to conclude that it is unfair for the chairperson of the disciplinary enquiry not to confirm whether the First Respondent understood what he was admitting when he pleaded guilty at the disciplinary enquiry and what the consequences of the admissions would be.

[13] The First Respondent alleged at the arbitration that he had pleaded guilty at the disciplinary enquiry without fully understanding the consequences of his actions and that he was advised to do so to avoid a serious sanction. The First Respondent maintained that he agreed to go along with this, even though he believed he was innocent of the charges.

[14] The First Respondent's version was that he had no intention to defraud his employer because the engine capacity of his 318i BMW was for a period of time 2.8 litres which had been installed in his vehicle due to an accident.

[15] The First Respondent's vehicle was well known to his employer and more specifically to his immediate superior who signed and approved the First Respondent's SNT claims. The SNT form was therefore properly completed for all to see.

[16] The First Respondent's evidence was that he neither recorded the tariff nor the amount of the claim on the SNT form. This was not challenged under cross examination. The tariff and the amount claimed was inserted by others to whom the forms where submitted and these claims were in turn approved by the First Respondent's superiors.

[17] The bundle of documents used during the arbitration contained a statement under oath of one Zithulele Richard Kubheka, the supervisor of the Maintenance Department of Ladysmith Provincial Hospital at which the First Respondent worked. He confirmed in the affidavit, that he never asked the First Respondent for the particulars of his vehicle when approving his subsistence claims. Mr Kubheka did not give an explanation why he approved the First Respondent's SNT claim for a 318i BMW reflecting a 2.8 litre engine, without raising any questions.

[18] It is also common cause that notwithstanding a detailed forensic report, there was no evidence to dispute the First Respondent's version that for a period of time, his BMW was fitted with a 2.8 litre engine. During the investigation the First Respondent's vehicle was not examined to determine the engine capacity.

[19] I am reminded by counsel for the First Respondent that it is not for this Court to decide whether or not the Third Respondent came to the correct decision or

whether I agree with the decision, but whether or not the decision was one that a rational decision maker could have arrived at.[1]

[20] The Supreme Court of Appeal expanded on the review test in *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*[2]as follows:-

> '…And while the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid "judicial overzealousness" in setting aside administrative decisions that do not coincide with the judge's own opinions... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable'.

[21] It is appropriate to refer to the guideline set out in the Code of Good Practice that requires:-

> 'Any person who is determining whether a dismissal for misconduct is unfair should consider-
>
> (a) whether or not the employee contravened a rule or a standard regulating conduct in, or of relevance to, the workplace; and
>
> (b) if a rule or standard was contravened, whether or not-
>
> (i) the rule was a valid or reasonable rule or standard;
>
> (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
>
> (iii) the rule or standard has been consistently been applied by the employer; and

[1] *Sidumo and Another v Rustenburg Platinum Mines Limited and Others* 2008 (2) SA 24 (CC); (2007).28 *ILJ* 2405 (LAC) at para 110.
[2] 2013 (13) ILJ2795 (SCA) at para 13.

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard'

[22] Although it was common cause that the First Respondent pleaded guilty to the misconduct charged at the disciplinary enquiry, it is clear that this was more because of a misguided strategy, than a genuine admission of fault. The evidence confirms that the First Respondent did not fully understand the charges presented to him and was advised by his representative to plead guilty as to short circuit the process and to ensure a soft sanction. More importantly, given the guidelines set out in the Code of Good Practice, there was no evidence to confirm that the First Respondent was aware of the different tariffs applicable to different engine capacities when completing the SNT form. No evidence was led to explain why the First Respondent's superiors signed off the SNT form confirming the information contained thereon without question.

[23] It is also necessary to consider the First Respondent's unblemished long service particular with the extent of the alleged fraud. One needs carefully to consider these facts in the context of what the First Respondent actually did and consider whether the Third Respondent's award was a reasonable decision.

[24] It is accepted that not every misconduct offence involving dishonesty warrants a sanction of dismissal.[3] Each case must be determined on the basis of its own facts and whether a decision to dismiss is a reasonable one.

[25] The Third Respondent finds the Applicant not to be entirely blameless and as a result limits the amount of back pay due to the Applicant. This approach is inherently reasonable when weighed against the evidence placed before him. No law was referred to during the course of the arbitration which obliges a vehicle owner to report the change of engine to the transport authority. The Applicant's emphasis of this point appears to have arisen from the content of

[3] *Shoprite Checkers (Pty) Ltd v CCMA and Others* [2009] 7 BLLR 619 (SCA) at para 20*; Edcon Ltd v Pillemer NO and Others* [2010] 1 BLLR 1 (SCA) para 4 and 9

the forensic investigation where one of the investigators a Mr Stephen van Eck, recorded that if engine registration numbers do not match with the details recorded by the traffic department, the vehicle in question could be "impounded by traffic officers".

[26] The Applicant's contention that the Third Respondent "committed a material error of law in that he imported the criminal justice model of fairness" is not supported by the facts. I was not referred to the parts of the record which indicates where the Third Respondent applied a strict test rather than the balance of probabilities, when assessing the evidence. An objective assessment of the record suggests that the Third Respondent did not misconstrue the true nature of the dispute, nor did he deprive the parties of a fair hearing.

[27] During the disciplinary enquiry, the chairperson took the attitude that "it was common knowledge that Mr Seedat is guilty as charged", and that he would not "analyse the mitigating and aggravating factors per se". In so doing he failed to take into account facts which may have reduced the severity of the First Respondent's actions.

[28] When regarding the totality of the evidence placed before the Third Respondent, it cannot be said that he failed to consider the principle issues before him and that he failed to properly evaluate all the relevant facts presented at the arbitration. The finding is rational and reasonable and is one that a reasonable decision maker could reach based on the totality of the evidence.

Costs

[29] In my view it will not accord with justice to expect the First Respondent not to recover his costs.

ORDER

[30] In the circumstances, I make the following order:-

30.1 The review application is dismissed with costs.

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Maeso AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate N Govender

Instructed by: State Attorney

For the Respondent: Advocate PG Blomkamp

Instructed by: Llewellyn Kain Attorneys