REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, POLOKWANE

JUDGMENT

Case no: JR 2984/12

In the matter between:

MOSEBUDI MATLOPELA	**Applicant**
and	
PROVINCIAL DEPARTMENT OF THE TREASURY	**First Respondent**
MAAKE FRANCIS KGANYAGO (*N.O.*)	**Second Respondent**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**Third Respondent**

Heard: 20 May 2015

Delivered: 30 September 2015

Summary: (Review – unfair labour practice – demotion – application dismissed)

JUDGMENT

LAGRANGE J

Introduction

[1] This is a review application to set aside an arbitration award issued by the second respondent in terms of which he dismissed the applicant's claim of an unfair labour practice concerning her demotion from a post at level 12 to a post at level 9 with effect from 1 September 2011, in which she earns substantially less than she did before. The applicant was demoted after being found guilty on charges of fraud, gross negligence and dishonesty arising from S&T claims made in respect of kilometres travelled between Polokwane and Johannesburg, in order to attend courses provided by the Public Relations Institute of South Africa (PRISA) in March, May and June 2010.

[2] The applicant also seeks relief declaring her only termination of her original contract of service on 31 August 2011 as unlawful, wrongful and unfair. This claim arises out of the fact that the payslip for 01 September 2011 records that date and the date of her appointment and contains no reference to her previous service with the first respondent.

[3] The first respondent was late in filing its answering affidavit and the applicant raised an *in limine* objection to this. However, as the first respondent correctly pointed out, paragraph 11.4.2 of the Labour Court Practice Manual provides that unless the other party files a notice of objection to the late filing of an affidavit within ten days after the receipt of the affidavit, the right to object thereto lapses. In this instance, the applicant did not file a notice of objection and accordingly this objection falls away.

[4] The applicant used her private vehicle to travel to the training courses and was entitled to claim travel allowance based on the number of kilometres travelled and related to the size of vehicle. In essence, the applicant was accused of inflating the actual mileage travelled in order to increase her travel allowance claim.

Material aspects of the evidence in the arbitration

[5] In the course of the arbitration hearing, evidence was led that the applicant had claimed for 943 km, 938 km and 1079 km travelled during her respective trips in March, May and June 2010. According to the evidence she ought only to have recorded approximately 608 km for each trip, at least one third less than each of her actual claims. Even allowing for 100 km travelled in the course of attending the training whilst in Johannesburg, approximately 200 km travelled on each trip needed further explanation.

[6] While she attended the training, the applicant stayed in Sandhurst and travelled to Ferndale each day for the training. The applicant said that the distance between her accommodation and the training facility was approximately 10 km.

[7] In respect of her trip in March, the applicant was challenged in cross-examination on how her return trip could have been 475 km, which was longer than her outward bound trip in light of her explanation that the apparently excessive distance on the outward bound trip was on account of getting lost due to road works connected with the preparation for the soccer World Cup. She then sought to explain the obvious discrepancy being attributable to the fact that she simply divided the total distance travelled to and from Sampson by two. In terms of the travelling time reflected she claimed to have travelled only thirty minutes longer on the outward bound trip than on the return. The applicant was then confronted with the fact that even if allowance was made for travelling to and from the accommodation and the venue whilst in Johannesburg, there was still approximately 200 km unexplained, which could not be attributed to the distance she might have travelled during the additional thirty minutes she took on her outward bound journey when she said she was lost. Her response was to attempt to shift the blame to the person who had approved the claims who should have asked her about it at the time. The applicant encountered similar problems in explaining the additional kilometres travelled during her trip in May 2010. In trying to explain the even more excessive finger relating to the June trip, she claimed that her supervisor had misled her in assisting her to complete the form because

he wanted to get her into trouble as he was already facing a sexual harassment claim, something she had not mentioned in her evidence in chief.

The arbitration award

[8] The crux of the arbitrator's reasoning is that he concluded that even though the applicant denied inflating her claims she was unable to justify all the kilometres she had claimed. He found that the ultimate explanation she relied upon namely, that she had simply estimated the kilometres travelled and had not properly completed the details of her trip on the log sheet amounted to negligence and by making such estimates she was implicitly conceding that she was not claiming the exact kilometres travelled which amounts to fraud.

[9] The arbitrator further concluded that in the circumstances where the trust relationship was broken because of her dishonesty, the employer had been lenient in only demoting her. By implication, the arbitrator seemed to be saying that she could just as well have been dismissed for the misconduct.

Grounds of review and evaluation

[10] I will only have regard to those grounds of review of which were supported by factual averments. Consequently, where the applicant simply made broad statements alleging fatal defects in the arbitrator's reasoning these are not dealt with. The main ground of attack on the arbitrator's award is to dispute its rationality. It is useful to mention that the current approach to a review test based on irrationality is as follows:

> "[12] That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That

assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence.

[13] The distinction between review and appeal, which the Constitutional Court stressed is to be preserved, is therefore clearer in the case of the Sidumo test. And while the evidence must necessarily be scrutinized 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'. The LAC subsequently stressed that the test 'is a stringent [one] that will ensure that … awards are not lightly interfered with' and that its emphasis is on the result of the case rather than the reasons for arriving at that result. The Sidumo test will, however, justify setting aside an award on review if the decision is 'entirely disconnected with the evidence 'or is 'unsupported by any evidence' and involves speculation by the commissioner."[1]

[11] Firstly, the applicant claims that the arbitrator did not understand the nature of the enquiry before him. The basis for this argument is that the applicant claims that he completely ignored her explanation that the kilometres travelled were unjustifiably perceived to be too high. She purports to reiterate her explanation that in some instances she got lost, in others the convenient routes which would have shortened the distance were under construction and the kilometres also included kilometres travelled to and from her accommodation. This is not a fair reflection of the arbitrator's reasoning. It is clear that he had difficulties in accepting the varied explanations she offered. It is clear from the evidence that even if a generous allowance was made for travel between the training venue and her accommodation during each trip, there was still a substantial number of unexplained kilometres travelled.

[12] The applicant further sites evidence of the arbitrator's supposed irrationality in that he failed to take account of the fact that the employer

[1] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 *ILJ* 2795 (SCA) at 2801-2

did not explain why it failed to refer her claims back to her if she had failed to properly record her travel from point-to-point as she was supposed to. In reviewing the evidence, the question of her failure to record each leg of her trip, it hardly assists her to blame somebody checking her submissions for the fact that the form was not properly completed in the first place. That was primarily her responsibility. In any event, the absence of a detailed log of her travels, simply made it more difficult for her to explain the excessive mileage travelled.

[13] She also claims that the arbitrator intervened unnecessarily during the course of her evidence and the examination of the employer's witnesses and that his intervention was high handed gratuitous and invasive. It is true that on occasion the arbitrator intervened in the proceedings, but where he did intervene it was largely in order to clarify issues or to avoid unnecessary or irrelevant evidence being led. The mere fact that the parties are represented, does not mean the arbitrator is required to behave like a mute linesman. The arbitrator, within reason, has an obligation to try and ensure that proceedings are conducted in an expeditious manner. There is certainly no evidence that in any particular respect the applicant was unduly prejudiced in being able to present her case as a result of the arbitrator's conduct.

[14] In addition, the applicant argues that the arbitrator's statement to the effect that she was let off lightly was insensitive and is a further indication that he was unduly biased in favour of the employer. The arbitrator's statement to this effect may have been unusually forceful, but it is saying little more than expressing his view that the employer was lenient in dealing with her misconduct. I do not think that is necessarily an expression of obvious bias.

[15] Lastly, she submits that in stating that she had failed to discharge the onus of proof he displayed his lack of understanding of the rules of evidence and misdirected himself as to who bore the onus of proof that the kilometres were inflated or that misconduct in the form of corruption, fraud and dishonesty was committed. It appears that perhaps the applicant was conceptualising the proceedings as a disciplinary enquiry *de novo* as

would have been the case if the dispute before the arbitrator was an unfair dismissal dispute. In terms of section 188 (1) of the Labour Relations Act 66 of 1995 ('the LRA'), an employer bears the onus of proving that the dismissal was substantively and procedurally unfair. In the case of an unfair labour practice the onus rests on the employee, in this case to prove that she was unfairly demoted. In so far as her case rests on an argument that she ought not to have been found guilty, it is for her to prove that the charges were unfounded. What is apparent from the arbitrator's own analysis and from the evidence she presented, it is that her evidence fell woefully short of explaining a significant portion of the mileage travelled on each trip, quite apart from the fact that her own explanations changed whenever she encountered difficulties with one of them.

[16] The applicant could not explain close to a quarter of the mileage for which she had claimed reimbursement for each trip. As the arbitrator noted, even on her own account she just estimated the mileage and did not bother to give an accurate account of her trip. Therefore, she knew that the figures she presented were not necessarily correct, but nonetheless she would be paid on the basis of what she had submitted. It was not unreasonable of the arbitrator to conclude that she was dishonest in not submitting the correct information, especially if one considers that she stood to benefit from any overstatement of the distance travelled. Concluding that she had made a dishonest representations in submitting her travel claims is not one that no reasonable arbitrator could have reached on the evidence.

[17] In the circumstances, I am not satisfied that the applicant has established any cogent reasons for the setting aside the arbitrator's award on review.

The alleged termination of the applicant's services

[18] As mentioned above, the applicant claimed that her services had been terminated on the face of the details appearing on her payslip of September 2011. Her concern in this regard was perhaps understandable since the payslip might be interpreted to give the impression that she had no prior service with the first respondent. In the first respondent's

answering affidavit it was said that the conclusion of the new contract was nothing but an operational matter intended to implement the award. Further, at the hearing of this matter, first respondent's counsel confirmed that the applicant remained in continuous employment and that there was no interruption of her service as a result of her demotion. For the sake of clarity this is recorded below.

Order

[19] The fifth review application is dismissed with no order as to costs.

[20] By agreement, it is declared that the service of the applicant was uninterrupted by her demotion with effect from 01 September 2011.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	M Ramushu of Messrs Ramushu Mashile Twala Inc.
FIRST RESPONDENT:	M Mphahlele Instructed by State Attorney, Pretoria