



CONSTITUTIONAL COURT OF SOUTH AFRICA

Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo and Others

CCT 227/14

Date of judgment: 10 December 2015

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning the review of an arbitrator's award which confirmed the dismissal of the applicant, Mr Gezani Julius Baloyi.

Mr Baloyi was employed by the Department of Health and Social Development, Limpopo (Department) as a learner artisan in 1987. In March 2004, he was charged with misconduct for his alleged role in the procurement of labour in order to service and repair incinerators in various clinics in Limpopo around May 2001.

Three charges were brought. The first was that he initiated a requisition for the repair and service of eight waste incinerators at various clinics that were not needed. Mr Baloyi contended that he had acted on the instruction of Dr Wasilota, the superintendent of the Hospital at the time. The second charge was that he confirmed delivery of the repair services by Prominent Medical Supplies CC (the supplier) knowing that the services were never rendered. Mr Baloyi argued that when he signed the store register in confirmation, he was relying on the authority of Mr Mathebula and Matron Chauke, who had signed and captured the invoice for payment. The third charge was that he authorised payment of R40 675 to the supplier for services not rendered.

After the disciplinary hearing, Mr Baloyi was dismissed. He then referred the matter to arbitration where he alleged that his dismissal was substantively and procedurally unfair. The arbitrator, at the request of Mr Baloyi, heard the matter under the auspices of the third respondent, the Public Health and Welfare Sectoral Bargaining Council (Bargaining Council). The arbitrator found that the dismissal was fair. Mr Baloyi then sought to

review and set aside the arbitrator's award in the Labour Court. In that Court, the arbitrator and the Bargaining Council failed to deliver the record of the arbitration proceedings. The Bargaining Council and the Department did not have an objection to remittal in light of the missing record. After the Labour Court ordered the reconstruction of the record, it adjudicated the review application despite the incompleteness of the record. The Court dismissed the review application. The Labour Appeal Court and the Supreme Court of Appeal both denied Mr Baloyi leave to appeal. In this Court, Mr Baloyi contended that the Labour Court's decision to confirm the arbitrator's award was improper as no proper record of the arbitration proceedings was before it. He argued that he had asked in the Labour Court for remittal to arbitration for the matter to be heard afresh. None of the respondents opposed this application.

In the majority judgment written by Moseneke DCJ, (Mogoeng CJ, Jafta J, Khampepe J, Nkabinde J, Theron AJ and Tshiqi AJ concurring) it was held that it was improper for the Labour Court to dismiss the review application in the absence of a proper record. It was held further that the Labour Court failed to take heed of the fact that the Bargaining Council had no objection to the remittal of the matter. The majority judgment found that reinstatement was the appropriate remedy for the following reasons: first, the Labour Court should have remitted the matter to the Bargaining Council as proposed by the arbitrator and the Bargaining Council itself. Second, Mr Baloyi had been employed for 19 years without previous misconduct – the sanction imposed was disproportionate to the alleged offence. Third, the value of remittal would be compromised as one of the key witnesses, Dr Wasilota, is deceased. Further, remittal would be unjust considering the amount of time passed since the dismissal. The arbitrator's award was set aside and it was ordered that Mr Baloyi be reinstated.

In a dissenting judgment by Froneman J, he noted that before the Labour Court and before this Court, Mr Baloyi sought an order for the remittal and rehearing of the arbitration proceedings. He found that since Mr Baloyi did not seek an order on the merits in the initial review, it would be inappropriate to do so here. This judgment further pointed out that none of the parties objected to the remittal Mr Baloyi sought and none of the respondents filed opposing papers. Further, the respondents did not address Mr Baloyi's contentions that the arbitrator had incorrectly recorded concessions allegedly made by Mr Baloyi. Froneman J highlighted that, in these circumstances, Mr Baloyi might be done a disservice if the matter were to be decided on an incomplete record of the arbitration proceedings. He thus disagreed that the matter could be, or should have been, decided on the incomplete record and would order a rehearing of the arbitration proceedings.

In another dissenting judgment, Cameron J (Madlanga J and Molemela AJ concurring), concluded that there are circumstances in which a court is able to scrutinise a reconstructed record of proceedings to determine whether a decision ought to be set aside. The arbitrator's notes, together with Mr Baloyi's supplementary affidavit, were sufficient to assess and dismiss Mr Baloyi's application. This is because Mr Baloyi provided the arbitrator's notes, recording concessions he made during the arbitration hearing, without objection or a satisfactory explanation. These were crucial to the

arbitrator's findings. Cameron J concluded that there was no basis to disturb the decision of the Labour Court, upholding the arbitrator's decision. For these reasons, Cameron J would have refused the application for leave to appeal for lack of prospects of success.