REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case Number: JR 1522/11

In the matter between:

SOUTH AFRICAN REVENUE SERVICE **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER J LE F PIENAAR **Second Respondent**

WINNIE MAHLAKOANE **Fourth Respondent**

Heard: 30 August 2013

Delivered: 12 September 2013

Summary: Review of award – double jeopardy - the two acts of the alleged misconduct are clearly distinguishable from each other, notwithstanding any similarities in their facts and in their role players. The second respondent misdirected himself when he conflated the two acts of misconduct into one.

JUDGMENT

CELE, J

Introduction

[1] The present application is one in terms of section 145 of the Labour Relations Act[1] (the Act) for the review and setting aside or correction of the arbitration award dated 25 May 2011 issued by the second respondent. The applicant seeks to have a finding made that the dismissal of the third respondent was fair. In the alternative it seeks to have the matter remitted to the first respondent for a *de novo* arbitration hearing before a commissioner other than the second respondent. The third respondent in whose favour the assailed award was issued opposed this application.

Factual background

[2] In the year 2000 the third respondent was unemployed. She was granted a child support grant in respect of her two minor children, in terms of the now repealed Social Assistance Act, 59 of 1992 ("*SAA*"). She resided with her husband and the father of her minor children, Mr Setshedi,

[3] On 1 February 2006 the applicant employed the third respondent. Accordingly, her entitlement to child support grants lapsed. She nevertheless continued to receive the grants, in breach of the SAA. When this came to light, the applicant brought the third respondent before a disciplinary hearing during 2008 on the charge of fraud alternatively breaching the applicant's disciplinary code in receiving child support grants in contravention of the SAA.

[4] In that 2008 disciplinary hearing, the third respondent contended that she had informed the agency responsible for distributing SAA grants, South African Social Security Agency ("*SASSA*"), that she no longer qualified for the grants.

[1] Act No 66 of 1995.

To this end she tendered two letters from SASSA dated 2 October 2006, in respect of each of her children, on face value of which SASSA confirmed that the third respondent no longer qualified for the grants.

[5] The chairperson of the 2008 internal disciplinary hearing, found the third respondent not guilty of fraud, since she did not make any misrepresentation. He still found her guilty of receiving SAA grants, which constitutes an offence in terms of the applicant's disciplinary code. Ultimately the chairperson held that dismissal was not warranted and he recommended the imposition of a final written warning, which recommendation the applicant accepted.

[6] During 2010, Mr Setshedi who was then the ex-husband to the third respondent, informed the applicant that he had assisted the third respondent to forge the SASSA letters, as tendered by the third respondent during the 2008 disciplinary hearing. The third respondent was charged by the applicant with five acts of disciplinary misconduct relating, *inter alia*, to fraud and forgery in that she had forged the SASSA letters and presented them into evidence at the 2008 disciplinary hearing. Following a disciplinary hearing the third respondent was dismissed of these charges on 15 September 2010. She referred an unfair dismissal dispute for conciliation and thereafter for arbitration. The second respondent found the dismissal to have been substantively unfair and ordered the applicant to re-instate her. The applicant initiated the present review application.

Chief findings of the second respondent and grounds for review

[7] On a conspectus of the award it is apparent that the commissioner's overall finding of double jeopardy is premised on the following findings:

1. The chairperson of the first disciplinary hearing made a "pertinent finding" that the SASSA letters were genuine and that they had not been fraudulently obtained by the third respondent, pursuant to a hearing where the applicant was afforded the opportunity to adduce evidence about the authenticity of the letters.

2. Implicit in the aforesaid findings is a finding that the charges in the both disciplinary enquiries related to the same offence.

3. The applicant's disciplinary code precluded the holding of a second hearing since it does not specifically provide for such eventuality.

4. Mr Setshedi, who provided the applicant with the information that resulted in the second disciplinary hearing, was not reliable since he had animosity toward the third respondent.

GROUNDS OF REVIEW

[8] The applicant submitted that the commissioner's conduct in this instance constituted misconduct, a gross irregularity and an excess of his powers and that the commissioner came to a conclusion that a reasonable decision maker could not reach. In particular, the applicant submitted that the award was irregular as a result of the commissioner's decision making process that was wanting to the extent that the failed to properly appreciate the legal and factual nature of the application of the legal principles relating to double jeopardy and he failed to follow the binding precedents in that regard. The applicant contended that the commissioner's finding of double jeopardy, and his reasons for that finding, had no support on the facts or in law. In that regard the applicant submitted that:

1. The commissioner erred insofar as he held that the charges that formed the subject to the first hearing were the same as in respect of the second hearing. On the basis of the common cause evidence before the commissioner, as set forth above, it is clear that the subject of the first hearing was the applicant's conduct in receiving child support grants after she became employed by the applicant. This was not the basis of the second hearing, which concerned the applicant's conduct in tendering forged evidence; i.e. the SASSA letters; at the first hearing.

2. The double jeopardy rule only comes into consideration in instances where an employee is recharged for the same conduct or offence that formed the subject of a previous hearing – not in instances such as the present where the second hearing concerns different conduct.

3. There is no indication on the record, in particular on the basis of the transcription or the outcome of the first (2008) disciplinary hearing, that the authenticity of the SASSA letters was in dispute at the first disciplinary hearing. As is confirmed by the commissioner's finding in par.40 of the award the possibility that the letters had been forged only came to the applicant's knowledge some years later. That combined with the fact that the SASSA letters did not form the basis of the charges in the first hearing, shows that it is most unlikely that the applicant would have challenged the authenticity of the SASSA letters at the first disciplinary hearing. Accordingly, the commissioner's finding that the applicant should have challenged the authenticity of the letters at the first hearing is not a reasonable one on the facts at hand.

4. Regardless, on the basis of the written outcome of the first hearing, in particular par.11 thereof as relied upon by the commissioner, there is no indication of any finding, let alone a "pertinent finding", by the chairperson of the first disciplinary hearing that the SASSA letters were genuine.

5. As is confirmed by the commissioner's finding in para 40 of the award, if Mr Setshedi had not approached the applicant during 2010 the second disciplinary hearing would probably not have taken place. In the absence of evidence to the contrary it is therefore apparent that the applicant only reasonably became aware of the issues surrounding the authenticity of the SASSA letters during 2010. Accordingly the time delay between the first and second enquiries did not in the circumstances preclude the applicant to convene the second enquiry.

6. As is further confirmed in the award, the applicant's disciplinary code did not make provision for the holding of a second disciplinary enquiry. The commissioner then concludes that the absence of such provision in the applicant's disciplinary code constituted a "stumbling block" for the holding of a second disciplinary enquiry.

7. The applicant's disciplinary code did however not contain any such express or implied prohibition. Accordingly, since the holding of a second disciplinary enquiry was not *ultra vires* the applicant's disciplinary code and the disciplinary code was therefore not a "stumbling block" for the holding of a second enquiry the commissioner misconstrued the case law he relied on.

8. The commissioner's oblique finding that the information given to the applicant by Mr Setshedi may not have been reliable is a further factor that he takes into account in concluding that the second hearing constituted double jeopardy. In this instance the commissioner seems to suggest that a second enquiry will only be competent in instances where an employer is satisfied on a balance of probabilities, in advance of the second hearing, of the veracity of the allegations/information that form the basis of the charges. There is no legal basis in support of such conclusion.

9. In the final analysis the allegations that formed the subject of the second hearing was neither canvassed during the first enquiry nor was any finding made in respect thereof. The said allegations only came to the applicant's reasonable knowledge after conclusion of the first enquiry and then formed the basis of different charges. The holding of a second disciplinary hearing is not prohibited under the applicant's disciplinary code. Accordingly the holding of a second hearing was fair in the circumstances and did not constitute double jeopardy.

[9] It was the third respondent's argument that the award granted by the second respondent was both reasonable and well considered. The following are grounds submitted in support of the argument above:

1. The first letters dated 02 October 2006, and tendered as evidence during the first disciplinary hearing, were accepted as exhibits without the applicant exercising its rights to challenge their authenticity and or submitting evidence to disprove their contents. In this regard, nothing prevented the applicant from leading evidence of the witnesses called in the second disciplinary hearing. The applicant therefore failed to put the said evidence in dispute when it should as it would have been fair to do so. On this aspect it is submitted that had the applicant dealt with these at that stage justice would have been achieved as applicant ought to query same without being assisted.

2. It was further clear that the production of the October 2006 letters and the admission thereof into evidence during the first disciplinary hearing, indeed influenced the outcome of the 2008 disciplinary hearing, thereby warranting a lesser sanction to a dismissal. This piece of evidence played a significant role in the determination of an appropriate sanction.

3. The applicant argument that the third respondent was disciplined on the basis of different charges, will not hold, on the grounds that the new charges were designed and formulated on the basis of documents that had already been presented in a previous disciplinary hearing and which documents, the applicant had failed to disprove. It is not logical to argue that the third respondent had committed another offence when charged subsequently in 2010.

4. The circumstances above, if accepted, as proposed by the applicant would leave the applicant with two materially conflicting records in that: the first disciplinary hearing accepted the evidence of the 2006 letters and then proceeded to subsequently dismiss same as forged. In the

second disciplinary hearing in 2010. It is noteworthy that this was done under a new charge and may therefore not be construed as rectification of the previous record.

5. Further it is noteworthy that the reason for the institution of the second disciplinary hearing, the circumstances that were prevalent as between the third respondent and the applicant's witness, the respondent's estranged spouse, also taking into account the lapse of time prior to institution of same, the second charge was thus malicious and unfounded and should be treated with all caution and the rational thereof was clearly apparent.

6. Further, when one takes into account the effluxion of time and the fact that the witness, Mr. Setshedi had confessed to forging documents and implicating the applicant with a clear objective of causing her to be dismissed the more the motive becomes clearer and injustice kicks in. This is very critical in this review process and it is submitted that on this basis alone the review application stands to be dismissed.

7. Furthermore, it is submitted and agreed with the commissioner's view that information by Mr Setshedi may not have been reliable. Upon careful ordinary scrutiny and on authenticity, the 2006 letters appears more legitimate than the 2007 letters which the applicant based their case upon. The argument by the applicant that the second hearing was about forged evidence, that is, SASSA letters and the first being on receiving grants only and this going into the merits as suggested, which argument is denied, it is submitted by third respondent that this will further be prejudice when the issue of authenticity of these documents are *res judicata* by the previous finding properly adjudicating on the matter..

8. In the final analysis on the forgery issue there remains no evidence at all that the third respondent did in fact forge SASSA documents and any allegations made in that regard should be treated with caution

same deserves thus leading not to accept same as truthful and assistive to obtaining justice of any offender charged.

9. Further when one weighs both hearings there seems to be more to the witness Mr Setshedi than the third respondent particularly regarding forging of documents. The evidence given by Mr Setshedi had a motive clear enough not to allow same to continue to prejudice third respondents life.

Evaluation

[10] Section 145 of the Act on the basis of which this application brought and to the extent relevant here states that:

> 'Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award.
>
> (2) A defect referred to in subsection (1) means –
>
> (a) that the commissioner-
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers; or
>
> (b) that an award has been improperly obtained.'

[11] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others,*[2] this Court held per van Niekerk J that:

> '…. section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of

[2] [2009] 11 BLLR 1128 (LC) .

reasonableness, but this does not preclude this Court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'[3]

[12] The applicant's contention that the commissioner's finding of double jeopardy, and his reasons for that finding, had no support on the facts or in law needs to be considered first. The allegations in support of the first misconduct of 2008 pertained to a failure of the third respondent to inform SASSA that she had found employment which disqualified her to continue to receive the child support grant as a result of which SASSA continued to pay the grant into her banking account. It was in defence of those allegations that she procured and produced the two letters allegedly obtained from SASSA. The misconduct was consequently constituted:

12.1 by a failure to report being disqualified to continue to receive the grant – *Commisio per omissiones;*

12.2 by keeping and using the grant proceeds;

12.3 in the period 2006 until the payment in terms of the grant was stopped and

12.4 against SASSA, in circumstances which violated the policy of the applicant.

[13] The allegations of the second act of misconduct pertained to:

13.1 the making of false declaration by word and conduct to the commissioner;

[3] Id at para 17.

13.2 an arbitration hearing held in 2008 and

13.3 procuring an arbitration award in 2008 and in her favour through deceitful means.

[14] In this simplified description, the two acts of the alleged misconduct were clearly distinguishable from each other, notwithstanding any similarities in their facts and the role players. The second respondent misdirected himself when he conflated the two acts of misconduct into one. In any event an employee may be charged for a misconduct committed during a disciplinary hearing as the employer employee relationship subsists even during the disciplinary hearing. I am accordingly in agreement with the applicant's contention that the commissioner's finding of double jeopardy, and his reasons for that finding, had no support on the facts or in law.

[15] Section 145(2) (b) of the Act illuminates the issue more in this matter as it states that a defect in an award as referred to in subsection 1 means that the award has been improperly obtained. In *Moloi v Euijen NO and Another,*[4] this Court per Maserumule AJ held that:

> 'Section 145 (2) (b) must be read in the context of the whole section. The grounds of review set out in the section distinguish between misconduct by the commissioner (s 145(2) (a) (i) and the improper obtaining of an award as a separate ground of review (s 145(2) (b). In my view, the latter subsection contemplates a situation where the one party to the arbitration, through fraud or other improper means, obtains an award in his or her favour. This can either be in the form of a bribe or by misleading and false or fraudulent representations which lead to an award being granted in that party's favour. It is different, in my opinion, from a charge that the commissioner misconducted himself, although it is quite possible that the commissioner`s misconduct may give rise to the improper obtaining of an award.'

[16] The applicant was therefore entitled to subject the third respondent to a second internal disciplinary hearing to deal with new and different accusations

[4] (1997) 18 ILJ 1372 (LC) at 1379A-C, See also *Graff-Reinet Municipality v Jansen* 1917 CPD 604 at 606 and *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C)at 38 A-C.

it had just received from her ex-husband. The issue of the applicant's disciplinary code precluding the holding of a second hearing since it did not specifically provide for such eventuality, is therefore no longer a moot point. The facts of this matter show that the second charge was triggered by a subsequent report received by the applicant. Therefore, even if it was held that the second enquiry exposed the third respondent to a double jeopardy, its holding would be fair in that it would accord both parties a chance to ventilate the new issues that had arisen.

[17] The evidence on the first arbitration hearing is clear, namely that documents handed in were taken to be what they purported to be. No one challenged the authenticity of the two letters handed in by the third respondent. The applicant had no basis to doubt the authenticity of the letters until Mr Setshedi came forward with his allegations. As soon as he made the disclosure, the applicant acted on it. Accordingly, the commissioner's finding that the applicant should have challenged the authenticity of the letters at the first hearing is not a reasonable one.

[18] The time span between the two hearings was not a design of the applicant as it did not know of the allegations by Mr Setshedi. Any prejudice suffered by the third respondent due to the time lapse of about two years, while possibly being a factor, relates to the fairness of a sanction, in the event the third respondent should be found guilty of the misconduct charged. From the perspective of the applicant, the second charge was neither malicious nor unfounded. Seen from the behaviour of Mr Setshedi though, his evidence should be treated with all caution and the rational thereof was clearly apparent. He meant to do his estranged wife the most horrible harm.

[19] The next probe turns on whether the applicant's evidence on the alleged misconduct of 2010 was sufficient to justify the third respondent being found guilty. In opposing this application the third respondent has contended that information by Mr Setshedi might not have been reliable. Further that upon careful ordinary scrutiny and on authenticity, the 2006 letters appeared more legitimate than the 2007 letters which the applicant based their case upon.

And also that, in the final analysis on the forgery issue there remains no evidence at all that the third respondent did in fact forge SASSA documents.

[20] In paragraph 41 of the award the second respondent made various findings including that:

> 'i. The officers from SASSA were adamant that the two contested letters could not have emanated from SASSA, but it emerged under cross examination by Mr Manyike that SASSA had been flooded with social grant applications, and that it had many teething and administrative problems;
>
> ii. This means that the evidence given by the applicant, supported by her witness, Ms Mtsweni, although both may be criticised in various respects, that they had gone to SASSA where the applicant had obtained the two contested letters, may be true;
>
> iii. The evidence of Ms van der Spuy that the applicant would not have been charged criminally if she had produced the two letters dated 2006-10-02, which she did not, is probably the strongest evidence against the applicant's version that the two letters were authentic and not fabricated.'

[21] The second respondent found that the officers from SASSA were adamant that the two contested letters could not have emanated from SASSA. He then neutralises this finding by concluding that it emerged under cross examination by Mr Manyike that SASSA had been flooded with social grant applications, and that it had many teething and administrative problems. It is difficult to understand what the latter conclusion had to do with the former finding. No link has been shown to exist between a flood of applications received, teething and administrative problems and the two letters. The commissioner's reasoning is at odds with the very evidence led by the applicant and found to have been strongly or adamantly tendered. The commissioner correctly finds that the third respondent and her witness's evidence had a number of discrepancies. He found that Ms van der Spuy presented the strongest evidence on the two contested letters compared to that of the third

respondent. How the commissioner ended with a finding in favour of the third respondent in this regard is a clear manifestation of his failure to apply his mind appropriately to the proven facts.

[22] A further consideration which militates against the version of the third respondent being probable is the second paragraph the two letters. It remained common cause that in 2006 the grant was not stopped but continued to be paid into the banking account of the third respondent. Yet this paragraph states that the grant was stopped. It is common cause that the grant was stopped in 2007. This is when the authentic letters are said by Mr Setshedi to have been issued.

[23] I, accordingly, conclude that the probabilities of this matter favoured the version presented by the applicant. The second respondent failed to apply his mind to the proved evidential material and therefore committed a gross irregularity as he ought to have found that the guilt of the third respondent was proved on the accepted evidence. The misconduct was of a serious nature as it involved the forgery, uttering and dishonesty, with the concomitant bring about of disrepute to the name of the applicant, as a government institution. The result is that this Court is bound to review and set the award aside.

[24] The Court then issues the following order:

1. The arbitration award dated 25 May 2011, issued by the second respondent in this matter is reviewed and set aside.

2. In its place, it is found that the dismissal of the third respondent by the applicant was substantively fair.

3. No costs order is made.

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Cele J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr. Riaz Itzkin
	Of Edward Nathan Sonnenburgs Inc.
For the Respondent:	Adv.R Letsipa
	Briefed by T. T Hlapolosa Inc.