REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No JR3155/11

In the matter between:

AFRISIX (PTY) LTD t/a AFRI SERVICES	**Applicant**
and	
KATHOLO WABILE NO	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
ELLA S SCHOEMAN	**Third Respondent**

HEARD: **20 DECEMBER 2012**

DELIVERED: **22 AUGUST 2013**

JUDGMENT

MTHOMBENI AJ

Introduction

[1] This is an application brought in terms of Section 145 of the Labour Relations Act 66 of 1995 ('the LRA").The Applicant seeks the following order:

1.1 That the arbitration award issued by the first respondent dated 11 November 2011,be reviewed and/or set aside;

1.2 That it be determined that the arbitration award of the first respondent be altered to read that the third respondent's dismissal was substantively and procedurally fair; and

1.3 Alternatively that the matter be remitted to the second respondent for proper determination of the dispute before a commissioner other than the first respondent.

[2] The review application was opposed by third respondent.

Condonation

[3] Applicant received third respondent's answering affidavit on 13 March 2012 and, according to Rule 7A (10) of this Court, was required to file its replying affidavit on or before 20 March 2012.

[4] Lelani Janse, a Human Resource Manager at the applicant, could not timeously attend to the finalization of the replying affidavit as she was attending to applicant's matters at second respondent's offices in Polokwane.

[5] Applicant considered this application important, having regard to first respondent's order reinstating third respondent and the amount of back pay.

[6] Applicant brought to the Court's attention its grounds of review and submissions in support thereof, which I shall deal with later herein below, and submitted that it had reasonable prospects of success.

[7] This Court has followed, in too great a number of cases to mention, the principles relating to applications for condonation set out in Melane v Santam

Insurance Co Ltd 1962 (4) SA 531(A) at 532C-F where the Appellate Division said:

"*In deciding whether sufficient cause has been shown, the basic principal is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case".*

[8] In my view, the degree of lateness and the explanation therefor are reasonable; indeed the matter is if considerable importance for applicant; and, as it will appear herein below, applicant has reasonable prospects of success.

Background facts

[9] Third respondent was employed as an Area Manager. As part of her duties, she was responsible for ensuring that all temporary and permanent staff carried out their duties in accordance with client expectations or requirements. Furthermore, it was also her responsibility to ensure that employees under her supervision had duly completed contracts of service.

[10] On 15 June 2011, the applicant charged the third respondent with failure to correctly complete a weekly leave and replacement register for a client and failure to organize a replacement or reliever for a client, thereby endangering a contract with a client.

[11] Following a disciplinary enquiry, third respondent was found guilty and dismissed. Aggrieved by her dismissal, third respondent referred the matter to second respondent alleging unfair dismissal.

[12] Second respondent held a conciliation meeting, but the dispute remained unresolved. Consequently, the matter was scheduled for arbitration before first respondent. The latter found that third respondent's dismissal was procedurally and substantively unfair and ordered her reinstatement with backpay.

Grounds of review

[13] Applicant submitted that first respondent determined an issue which third respondent did not raise and present as an issue at the arbitration hearing. In doing so, applicant contended, first respondent exceeded his powers.

[14] In support of its submission in this regard, applicant contended that second respondent was called upon to determine whether third respondent was hindered during her cross-examination and whether she was refused the opportunity to submit mitigating factors and whether this prejudiced her case.

[15] While first respondent found that third respondent had failed to follow a standing order and procedure, applicant submitted that it is difficult to comprehend that first respondent found in third respondent's favor.

[16] Applicant submitted,further that first respondent misconstrued the evidence led at the arbitration hearing in that he concluded that applicant had dismissed third respondent because she was on a final written warning. On the contrary,applicant contended,evidence before third respondent was that the acts of misconduct third respondent was found guilty of warranted dismissal for a first offence. Moreover,first respondent failed to take into account that third respondent had received a written warning and final written warning for the same offence three months prior to her dismissal.

[17] Applicant also submitted that first respondent committed a gross irregularity in that he failed to exercise his discretion properly as he ordered applicant to reinstate third respondent in circumstances where clear evidence indicated that restoration of any employment relationship would be intolerable.

[18] When ordering applicant to reinstate third respondent, applicant submitted, first respondent exceeded his powers in that he failed to apply his mind and have proper consideration of the facts and the law.

[19] In essence, the grounds of review are that first respondent:

19.1 committed misconduct in relation to the duties of the commissioner as an arbitrator;

19.2 committed a gross irregularity in the conduct of the arbitration proceedings; and

19.3 exceeded the commissioner's powers.

Analysis of the arbitration award

[20] At the commencement of the arbitration hearing, first respondent, in conjunction with the parties, narrowed the issues in dispute. The transcript of the arbitration proceedings has captured the issues as narrowed as follows:

*"**COMMISSIONER**: Issues in dispute the applicant will allege both procedural and substantive unfair (sic),procedural unfairness I will hear evidence based on the Chairperson's bias and the bias manifested itself in the following forms the Chairperson while allowing the applicant to cross examine the respondent's witness never the less hindered that cross examination in the sense that the applicant was not allowed to follow up or build on question of cross examination and was stopped frequently by the Chairperson.(Own emphasis)Is that what I understand you to be saying Mr. Motloung?*

***MR MOTLOUNG:** That's correct Mr Commissioner.*

***COOMMISSIONER**:And second manifestional (sic) bias of course is that the Chairperson did not give the applicant the opportunity to address the Chairperson in mitigation of sanction or to place what is commonly called mitigating circumstances before the hearing correct Mr Motloung?*

***MR MOTLOUNG**: That's correct Mr Commissioner.*

***COMMISSIONER**: Those are the procedural issues; you allege that in so far as substantive unfairness is concerned the applicant concedes that there was a rule that regulated her contract in the work place.The rule was or the rules because there are more than one rule or rules (sic) are reasonable the applicant is aware of those rules.The employer consistently applies those rules in so far as application of the rules and sanction in other words sanction being the appropriateness of the sanction in the event of the contravention(sic).However the applicant brings one major*

substantive challenge being that she did not contravene the rules as alleged correct Mr Motloung?

***MR MOTLOUNG**: Correct Mr Commissioner."*

[21] It is clear from the above passages that the procedural and substantive issues in dispute were common cause. I am convinced that the parties were *ad idem* in this respect. This is borne out by the above passages in which first respondent clarified and confirmed that the issues had been so narrowed. However,first respondent allowed applicant the benefit of an issue that had not been raised during the arbitration proceedings. Differently stated,first respondent engineered a process in terms of which third respondent could succeed,while applicant was not afforded the opportunity to call witnesses who could testify on the issue had it been raised. In this respect,the first respondent stated in his arbitration award that:

"The applicant's procedural challenge, as I see it, was primarily that the chairperson of the disciplinary hearing was biased in favour of the respondent.Whilst Mr Motloung contended at the start of proceedings that the procedural unfairness took the form of hindering the applicant's right to cross-examine and the right to present argument in mitigation of sanction, I find that I have to consider the chairperson's conduct as a whole as depicted in the evidence."

[22] First respondent continued and stated that:

"In the circumstances of the present case,I find that the chairperson did much worse than asking the one party difficult,whilst asking the other party soft,questions.The evidence points very clearly to the fact that Ms Janse asked questions only of the applicant.In my view,Ms Janse's conduct in this regard,especially in the absence of questions by the complainant,amounted to cross-examination and,by analogy,the complete inseparability of her role as an impartial chairperson,and that of a complainant who pursues the interests of the employer.I find that it is impermissible,from a fair procedure point of view,for a chairperson to simultaneously occupy the role of a complainant in the manner that Ms Janse did at the applicant's disciplinary hearing in colloquial terms,Ms Janse was a player and referee at the same time and I have no hesitation finding that the dismissal of the applicant was,consequently,procedurally unfair."

[23] While first respondent is empowered by Section 138(1) of the LRA to conduct an exercise to identify and limit the issues in dispute,I agree with Ms Groenewald who appeared for applicant,that in basing his finding on an issue applicant did not raise a during the arbitration proceedings first respondent's conduct constituted a gross irregularity and he also committed a gross misconduct.Moreover, first respondent did not raise this point as a concern and invite the parties to address him on.For this reason,applicant did not lead evidence on this point,for it was not made aware that first respondent would make a finding on this issue.In this regard,first respondent failed to observe the *audi alteram partem* rule.(See East Cape Agricultural Cooperative v Du Plessis and Others [2009] 9 BLLR 1027 (LC);Solomon v CCMA and Others (1999) 20 ILJ 2960 (LC) at paragraph 19.) This Court in AA Ball (Pty) Ltd v Kolisi and Another [1998] 6 BLLR 560(LC) said:

"As stated above it is my view that the arbitrator committed a gross irregularity by finding the existence of a procedural defect in proceedings which were otherwise fair, without the matter being raised by either of the parties and did so after the proceedings had been concluded.I am also of the view that the Commissioner also exceeded his/her powers in addition to committing a gross irregularity by disregarding the fundamental principle of audi alteram partem." (See JD Trading (Pty) Ltd t/a Giddy's Electric Express v CCMA and Others [2009] 3 BLLR 211 (LC) at paragraph 22.

[24] In this connection, it is apposite to make reference to Rustenburg Platinum Mines v Commission for Conciliation Mediation and Arbitration and Others (2007) 28 ILJ 1114 (LC) at paragraph 25 where Molahlei AJ, as he then was, said:

"In my view it is clear from the above analysis that the issue of 'incitement' was never put as an issue before the commissioner.This was further supported by how the respondents formulated the issue for consideration by the commissioner in their heads of argument during the arbitration proceedings.

[25] The Court in paragraph 28 continued and stated that:

"In essence the conclusion of the commissioner amounted to a defence of 'incitement'on the part of the respondents.It is unjustified and in a technical sense the commissioner committed gross misconduct in relying on a defence that was not pleaded nor articulated by Modisakeng in his testimony.It is a defence which was never brought to the attention of applicant and accordingly the applicant was denied the opportunity to respond to the defence.Reliance on this defence gave the employees an unfair advantage."

[26] At paragraph 29, the Court went further and cited with approval Matla Coal Ltd v Commission for Conciliation Mediation and Arbitration Case No JA33/04, where Nicholson JA, as he then was, said:

"Where a defence is not pleaded and not articulated in evidence it is not a defence and a court errs when that "defence" is made a reason for its conclusion.The essence of our procedure is to give each party to a dispute a fair opportunity to put his or her case and meet the allegation made by the other party.To this end there are pleadings which define and therefore give warning of the issues in dispute."(See Parmalat South Africa (Pty) Ltd v Commission for Conciliation Mediation and Others [2009] 6 BLLR 558(LC); AA Ball (Pty) Ltd v Kolisi and Another [1998] 6 BLLR 560 (LC); Abdul and Another v Cloete NO and Others [1998] 3 BLLR 264(LC) at paragraph 12).

[27] In the light of the above *dicta*, I am satisfied that first respondent's arbitration award is reviewable for his relying on an issue which was not raised during the arbitration proceedings.

[28] First respondent concluded on the facts as follows:

"In the final analysis, I find that the applicant could only be held responsible for contravening the rule which required her to exercise care and diligence in the completion of the weekly forms for the period 30/05/11 to 12/06/11, as well as the rule similarly requiring care and diligence in the completion of Ms Phakathi's contract of employment."

[29] This notwithstanding, first respondent reasoned that:

"I do not find the applicant's sloppiness in completing the forms to have been so grave that a sanction of dismissal was warranted.I find that the respondent arrived at

a sanction of dismissal simply because the applicant was on a final warning for similar misconduct.However,I find that it is not axiomatic that because an employee is no(sic)a final warning,that employee must be dismissed in the event the employee commits similar misconduct during the currency of the final warning…In fact,the respondent should have considered the fact that is (sic) own disciplinary code guides that an employee on a final written warning could be dismissed,and not necessarily that such an employee will be dismissed."

[30] It was common cause that third respondent had received a final written warning for the same offence which she was dismissed for less than three months prior to her dismissal.This Court in National Union of Mine workers and Another v Amcoal Colliery and Another (2000) 5 LLD 226 (LAC) held that dismissal of an employee on a final warning who commits the same offence will be justified.In this connection,I am satisfied that first respondent misconstrued the established legal principle relating to final warnings and failed to explain his departure therefrom.I am satisfied that first respondent's conclusion in this regard was irrational and,therefore,reviewable.

[31] Moreover,the transcript of the arbitration proceedings does not reflect that evidence was led on applicant's disciplinary code,save that Ms Janse ,who chaired the disciplinary enquiry held for third respondent,testified that:

"After all the facts and evidence before me was taken into consideration as well as the mitigating factors I have also looked at the employee's or the applicant's previous disciplinary record if I may refer to page number 48 and 49 its two different occasions that the applicant was charged with similar offences a written warning was dated 22nd of March 2001 that she has received the outcome and a final written warning dated 20th May 2011".

[32] First respondent's gratuitous and unjustified finding on applicant's disciplinary code with regard to the status of a final warning gave third respondent the advantage of a defence that had not been pleaded or raised or brought to the attention of first respondent during the arbitration proceedings. (See Rustenburg Platinum Mines, Matla Coal Limited and Parlamat South Africa (Pty) Limited supra).In this regard, I am satisfied that first respondent committed misconduct.

[33] When first respondent ordered third respondent's reinstatement he stated:

> *"The applicant requested reinstatement,if possible.This is one of the primary remedies for unfair dismissal envisaged in Section 193 of the Act.I have found nothing in the evidence to lead me to the conclusion that the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable,or that it is not reasonably practicable for the respondent to reinstate the applicant…Of course,the respondent attempted to lead evidence that the relationship of trust was destroyed,but this evidence was so contradictory that I find the respondent's claim in this regard to be more than a quick improvisation for the purposes of these arbitration proceedings."(Own emphasis).*

[34] The transcript of the arbitration proceedings indicates that Ms Vorster,when asked if she would have a problem if first respondent should reinstate third respondent,replied that she had a problem with third respondent's work performance.For this reason,Ms Vorster continued,third respondent had been had been given lots of chances at disciplinary enquires and warned.In my view,an inescapable conclusion is that applicant had considered graduated discipline,but third respondent was not responsive thereto and applicant had no option but to terminate the employment relationship.To hold otherwise,in my opinion would be preposterous.

[35] I could not find any contradiction in Ms Vorster's testimony.I am, therefore, satisfied that such evidence should have been considered when determining whether the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable as contemplated in Section 193(2) (b) of the LRA.

[36] In my view, first respondent not only misconstrued the evidence, but also attributed improper motives to applicant which could not be reasonably drawn from Ms Vorster's testimony.From this point of view I am, therefore, satisfied that first respondent misconducted himself and exceeded his powers.

[37] In Sidumo and COSATU v Rustenburg Platinum Mines Ltd and Others at paragraph 267 Ngcobo J, as he then was, when he added his view to the test this Court should adopt in review applications said:

"It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner.The parties to a CCMA arbitration must be afforded a fair trial.Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined.Fairness in the conduct of proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute.One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason.In my judgment,where a commissioner fails to apply his mind to a matter which is material to the determination of the fairness of the sanction,it can hardly be said that there was a fair trial of issues.

[38] At paragraph 268, Ngcobo J went on to say:

"It follows therefore that where a commissioner fails to have regard to material facts,the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate.In so doing,in the words of Ellis,the commissioner's conduct prevents the aggrieved party from having its case fully and fairly ventilated.This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in Section 145(2)(a)(ii) of the LRA and the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings".

[39] The above *dicta* fortify my view that first respondent misconducted himself, committed a gross irregularity and exceeded his powers in the manner I have described hereinabove.For all of these reasons, in my view, applicant did not have a fair hearing before first respondent.I concur with the following *dictum* by Mason J, as he then was, in Ellis v Desai 1909 TS 576, where the learned Judge said:

"*But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but the method of the trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."* (See Goldfields Investment Limited and Another v City Council of Johannesburg and Another 1938 TPD 551 at 560).

The upshot is that first respondent's arbitration award is not one that a reasonable commissioner could have made as contemplated in Sidumo (supra).

[40] Applicant has requested the Court to substitute its decision for that of first respondent.I am satisfied that,on a proper analysis of all the material that was placed before first respondent,I can make a fair finding in relation to the fundamental issues on the facts before me.With regard to costs,in my view this is not a case where costs should follow the result.Given the manner I have found first respondent to have conducted himself in during the arbitration proceedings,it will be unfair that third respondent be penalised for opposing this application and bear the costs thereof.

[41] In the result, I make the following order:

41.1 Condonation of the late filing of the reply is granted;

41.2 The application for the review and setting aside of first respondent's arbitration award, dated 11 November 2011, under Case Number GAJB18256-11 succeeds;

41.3 First respondent's award is altered to read that third respondent's dismissal was substantively and procedurally fair and third respondent's referral to second respondent is dismissed; and

41.4 I make no order as to costs.

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Mthombeni, AJ

Acting Judge of the Labour Court

Appearance:

Applicant: Ms A Groenewald from Anika Groenewald Attorneys

Respondent: Mr D Gobile from Karabo Labour Organisation