THE LABOUR COURT OF SOUTH AFRICA,

IN POLOKWANE

Of interest to other judges

CASE NO: J 47/12

In the matter between:

MOGALAKWENA LOCAL MUNICIPALITY	**Applicant**
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**First Respondent**
MOHUBEDU SIMON RANTHO (*N.O.*)	**Second Respondent**
IMATU obo P C BODENSTEIN	**Third Respondent**

Heard: 20 May 2015

Delivered: 4 June 2015

Summary: (Review- unfair dismissal – employee pleaded guilty to theft – arbitrator finding dismissal unfair – arbitrator's findings unreasonable on substantive fairness – findings of procedural unfairness stemming in part from improper conflation of non-compliance with a procedure with procedural unfairness – but other finding still sufficient to sustain finding of procedural unfairness – failure to take account of all aggravating factors not necessarily rendering finding on substantive fairness unreasonable)

JUDGMENT

LAGRANGE, J

Background

[1] This application is an application to review and set aside an arbitration award in terms of which the arbitrator found that the dismissal of the individual third respondent, Mr P C Bodenstein (' Bodenstein'), by the applicant was substantively and procedurally unfair. The arbitrator ordered relief in the form of reinstatement.

[2] Bodenstein was charged with two counts of theft relating to the same incident. The charges related to the removal of a bag containing blankets which had been left at a venue known as Van Rensburg hall in preparation for a St John's ambulance training program on 6 January 2011. The bag belonged to the St John's Ambulance service. He was dismissed after being found guilty on two counts of theft of the applicant's property and of St John's Ambulance respectively, though there was no evidence that the property belonged to any other entity than St John's Ambulance.

Outline of material evidence

[3] For the sake of contextualising the matter, a brief outline of the sequence of events leading to the charges being instituted against Bodenstein is necessary. Bodenstein was a carpenter handyman employed by the applicant for fifteen years. On 6th January he had gone to the hall to fix a door with his team comprising Messrs. Mongwe ('Mongwe') and Mokgoba ('Mokgoba'). At the hall they found two bags without identification markings on them. Bodenstein testified that they did not know who the bags belong to, but could see that one of them contained blankets. He told Mongwe to take the bag as there was something for him 'for Christmas' inside the bag. He claims that when he returned to their vehicle the vehicle had already been packed. After they had returned to the workshop with the vehicle Mongwe unpacked the equipment on the vehicle and he noticed that

he removed one of the sports bags they had seen from the vehicle and placed it in the workshop. Bodenstein carried on with his administrative work. He then saw Mongwe putting the blankets in a large plastic bag. Mongwe took the bag with him when he left at 16h30.

[4] On Monday, 10 January 2011, Bodenstein was asked by a superior if he knew anything about the items which were in the hall and he told her he did know and would make enquiries with Mongwe. He then went together with Mokgoba to see Mongwe who was in hospital for a check-up. An arrangement was made with Mongwe to fetch the blankets from his house and the blankets together with the bag and the other contents, which were at the workshop, were returned to the municipality by 14H00 that day. Bodenstein said that his remark to Mongwe about taking the bag for Christmas was meant to be a joke, but there was a misunderstanding and he apologised for what had happened.

[5] Under cross-examination, the applicant was pressed to admit to the theft. He testified in Afrikaans and the bilingual interpretation of the questions put to him and the answers he gave left much to be desired. It is obvious that the interpreter's understanding of Afrikaans was very limited. He conceded that he had been found guilty of theft and in the enquiry but was adamant that he had not taken the goods and placed them in the van himself, nor had he been present when this was done. What he was clearly sorry for was for making the suggestion to Mongwe that the blankets could be a 'Christmas box' for him. He regretted that, what began as a joke turned out so wrong and acknowledged that he never should have said what he did to Mongwe.

[6] For reasons which are unclear, Mongwe was not charged with any misconduct relating to his removal of the goods. Mongwe confirmed Bodenstein's version that Bodenstein had invited him to take the blankets and he had agreed saying he would give them to his wife. The only point of difference was that Mongwe claimed that Bodenstein told him to load the bag on the van. Mongwe claimed that he did so because he did not have a car himself.

The arbitrator's award

[7] Bodenstein had complained that his dismissal was substantively unfair because he had been found guilty of two charges, whereas it should have been one charge. He also contended that, in light of the circumstances surrounding the transgression that dismissal was an inappropriate sanction and the trust relationship between him and the employer had not been destroyed. Bodenstein also complained of various procedural irregularities which are mentioned briefly below.

[8] The arbitrator found that the applicant's dismissal was substantively and procedurally unfair. He found that the dismissal was procedurally unfair because:

8.1 The arbitrator had spoken to both the representatives independently about the closing argument submissions which were made in writing contrary to clause 7.14 of the disciplinary code and procedure of the S ARL GBC which prohibited a presiding officer from conferring with one party without the consent of the other.

8.2 He also failed to announce his decision within ten days of the last date of the enquiry but did so only after thirty days, again in breach of clause 7.6 of the same procedure.

8.3 Lastly, he failed to invite evidence in mitigation or aggravation.

[9] His findings leading to a conclusion that the dismissal was substantively fair may be summarised as:

9.1 Bodenstein ought to have been found guilty of only one charge.

9.2 Despite the importance of the charge, the employer had overreacted in dismissing Bodenstein given the weight of the mitigating factors.

[10] The arbitrator substituted the sanction of dismissal with a final warning valid for six months and ordered the reinstatement of Bodenstein.

Grounds of review

[11] The applicant contended in summary that:

11.1 the arbitrator misapplied the law in his analysis of the evidence of an argument, though it must be said that the specifics of this ground of review were not spelt out in the founding affidavit as it should have been;

11.2 he applied the disciplinary code in a partial manner by requiring strict adherence by the employer to the procedures in the code but not adhering to the code when it came to the appropriateness of the sanction in terms of which theft is treated as a serious offence;

11.3 It was a gross misdirection of the arbitrator to say that the employer overreacted given that the offence concerned theft which is serious;

11.4 the arbitrator exaggerated the mitigating factors and ignored aggravating ones such as the loss of reputation suffered by the applicant as a result of the incident and the fact that the removal of the items caused the training to be delayed by a day;

11.5 the arbitrator also misunderstood the provision of the code which states that as a guideline an employee may be dismissed on the first occasion for theft, whereas he should have realised that the provision was not merely directory or permissive.

Evaluation

[12] On the question of the arbitrator's findings on procedural fairness, it seems clear that even though he alluded to the following statement in the judgement in **Avril *Elizabeth Home for The Mentally Handicapped v Commission For Conciliation, Mediation & Arbitration & Others***[1], he did misconstrue the implications of the following statement in the judgment insofar as the determination of procedural fairness is concerned:

[1] (2006) 27 *ILJ* 1644 (LC)

"This is not to say that employers and unions cannot agree to retain the criminal justice model if they are so inclined, whether by way of a collective agreement (as was the case in MEC: Dept of Finance, Economic Affairs & Tourism, Northern Province v Mahumani(2004) 25 ILJ 2311 (SCA); [2005] 2 BLLR 173 (SCA)) or by G way of a contract of employment or employment policies and practices. In this instance, employers are obviously bound to apply the standards to which they have agreed or that they have established."

[13] A statement that the parties may bind themselves to a more onerous procedure does not mean that when procedural fairness of a dismissal has to be determined in the arbitration under the LRA that a failure to comply with aspects of such a procedure automatically results in procedural unfairness as adjudged by the standards set by the LRA. It is important to note that section 188 (2) of the LRA only imposes a requirement on a person deciding if a dismissal was effected in accordance with a fair procedure to take into account "any relevant code of good practice issued in terms of this Act." The section does not suggest that the procedural fairness of a dismissal must also be measured mechanically against the procedural stipulations of a particular disciplinary code. No doubt, if an employer denies an employee their right to use the more extensive procedural provisions of an agreed disciplinary code so that the employee's ability to conduct their defence to the charges is prejudiced, a finding of procedural unfairness might still be appropriate, even though the provisions breached set a higher standard than the LRA requires. However, it is not sufficient that merely because a provision in an agreed procedure is not complied with, that such non-compliance can be equated with procedural unfairness *per se*. In this instance, the arbitrator appeared to have adopted the stance that non-compliance with the disciplinary code and procedure automatically required a finding of procedural unfairness.

[14] In this respect, I would therefore agree with the applicant that the arbitrator misconstrued matters when he adopted the rigid view that procedural non-

compliance was tantamount to procedural unfairness, and his first two findings on this basis should be set aside.

[15] In respect of his finding that the employer unfairly denied Bodenstein an opportunity to lead mitigating evidence as permitted by the code, when his representative declined to make written submissions, it cannot be said that this was not one of alternative feasible interpretations of the evidence. He might have held that Bodenstein's representative should have made it clear that in declining to make written submissions he was not abandoning Bodenstein's right to lead evidence in mitigation, but I cannot say that the finding he made was one that no reasonable arbitrator could have arrived at on this issue. Accordingly, the arbitrator's ultimate finding that Bodenstein's dismissal was procedurally unfair ought to stand on this basis, though not on account of the two subsidiary findings referred to in paragraphs 8.1 and 8.2 above. In truth, the real challenge on review relates to the arbitrator's finding on the unfairness of the sanction of dismissal.

[16] The essence of the applicant's complaint in relation to substantive fairness is firstly, that the arbitrator irrationally did not appreciate that when it came to the question of sanction, the disciplinary code was prescriptive. Secondly, in weighing up the aggravating and mitigating factors in determining an appropriate sanction, the arbitrator unreasonably failed to give due weight to the aggravating factors.

[17] On the question of the policy of the applicant's disciplinary code in relation to the question of sanction the code states that theft or dishonesty are types of misconduct which generally would not attract progressive discipline. Clause 2.7.4 states:

> *"2.7 <u>As a guideline</u>, an employee may be dismissed on the first occasion for, inter-alia:*
>
> *…*
>
> *2.7.2 Theft, unauthorised possession of or malicious damage to the employer's property;…"*

[18] This approach is not markedly different from what is stated in item 3 (3) and (4) of Schedule 8, Code of Good Practice: Dismissal in the LRA, namely:

> *"(3) ... More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.*
>
> *Dismissals for misconduct*
>
> *(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and use of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case must be judged on its merits, gross dishonesty or willful damage to the property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case or dismissal might be a dismissal will not be fair if it does not meet the requirements of section 188."*

[19] Item (5) goes on to state the additional considerations that must be taken into account when the prospect of dismissal as a sanction is entertained:

> *"(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.*

[20] The judgement of the Constitutional Court in Sidumo & Another v Rustenburg Platinum Mines Ltd & others [2]… decided amongst other things that:

20.1 *"The CCMA correctly submitted that <u>the decision to dismiss belongs to the employer but the determination of its fairness does not</u>. Ultimately, <u>the</u>*

[2] (2007) 28 *ILJ* 2405 (CC) at

commissioner's sense of fairness is what must prevail and not the employer's view."[3]

20.2 *"In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."*[4]

20.3 *"In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances".*[5]

[21] I do not see how the arbitrator can be faulted for not treating the recommended sanction in the disciplinary code of dismissal for theft as peremptory. The disciplinary code itself is expressly a guideline and states a general rule, but nonetheless the employer and the arbitrator are obliged in terms of Item (5) to consider other factors when dismissal as a sanction is under consideration. In any event, the arbitrator was responsible for determining the fairness of that decision as the *dicta* from *Sidumo* cited above make clear.

[22] A further factor which is to be considered to deal with this ground of review is that the focus of review in evaluating the reasonableness of an arbitrator's decision is no longer on the arbitrator's own reasoning but whether no reasonable arbitrator could have arrived at the same outcome on the evidence before the arbitrator. In, ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*** the SCA put it thus:

[3] At 2432, para [75].
[4] At 2432-3, para [78]
[5] At 2433, para [79]

> *"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."*[6]

(emphasis added)

[23] Also, a mere failure to have regard to material facts is not sufficient to set aside an award on review as succinctly expressed in ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*** where the LAC restated the principle governing the assessment of a failure to consider material facts:

> *"[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health & another NO v New Clicks SA (Pty) Ltd & others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork."*[7]

(emphasis added)

[24] I agree with the applicant that, in considering aggravating factors, the arbitrator did not consider the reputational consequences of the bag containing blankets and other items being removed or the fact that the training event had to be postponed

[6] (2013) 34 *ILJ* 2795 (SCA) at 2801, para [11]
[7] (2014) 35 ILJ 943 (LAC) at 950

for a day. The arbitrator also might not have accorded the offence of theft as much gravity as it ordinarily deserves.

[25] However, the theft which Bodenstein was actually implicated in was not the typical kind in which the accused employee removed some goods belonging to his employer or a third party at the workplace for his personal benefit or gain. Although Bodenstein was found guilty of taking property for his personal benefit or gain, there was no evidence that he had taken the property or that he had benefitted from Monqwe taking the goods. If anyone stood to benefit from the removal of the bag it was the person who actually took it, who was not charged. Incidentally, Mongwe's *bona fide*'s in removing the bag with the blankets simply on the basis of Bodenstein's say so was never questioned. Bodenstein also readily and promptly co-operated as soon as the issue of the missing items was raised with him, and he ensured that Mongwe returned the goods which were in Mongwe's possession. Apart from his sixteen years of service with a clean record, he was also contrite about the consequences of his reckless invitation to Mongwe.

[26] Much was made by the applicant of Bodenstein's formal admission that he was guilty of theft, but any realistic appraisal of his badly interpreted evidence showed that what he actually believed he admitted to was that he wrongfully invited Mongwe to help himself to the bag with blankets, not that he had personally stolen the items in question for his own benefit. In the circumstances, even though the arbitration had proceeded on the basis that Bodenstein had admitted being guilty of theft, the real nature of his misconduct was not so straightforward and neither was his admission.

[27] In the context of the particular incident, I cannot say that the arbitrator was unreasonable in believing that despite Bodenstein's formal admission of theft dismissal was not the obvious sanction.

[28] But does the arbitrator's apparent failure to consider the aggravating factors identified by the applicant nevertheless mean that his award failed to meet the constitutional imperative that his award must be rational and reasonable? To put it differently, could any reasonable arbitrator who did take those factors into account

have concluded that the sanction of dismissal was unfair and a lesser sanction was appropriate? The factors identified concerned: the negative reputational consequence of the incident for the applicant; Mr Malepa's evidence (which was not part transcribed) that Bodenstein could be relied on to protect the Municipality's interest and that employees were consistently dismissed for theft, and that the Municipality had lost its trust in Bodenstein. These factors would still have to be weighed against the peculiarities of the incident and the characterisation of the charge as one of theft by Bodenstein; his long and hitherto clean record; his ready co-operation and evident contrition for his reckless conduct considered in the round, it does not seem to follow as a matter of necessity that no reasonable arbitrator weighing up all these factors could have decided that because the training event was delayed, or because the council's reputation was a final written warning was not a fairer sanction. The fact that other reasonable arbitrators might have agreed that the dismissal was fair because they gave different weight to all the mitigating and aggravating factors is not the issue.

[29] In light of the analysis above, I am satisfied that the arbitrator's award should stand.

Order

[30] The application is dismissed.

[31] No order is made as to costs

R LAGRANGE, J

Judge of the Labour Court

Appearances:

For the Applicant: A P Laka, SC

Instructed by: Mohale Inc.

For the Third Respondent: P de Beer of IMATU