**IN THE LABOUR COURT OF SOUTH AFRICA**

**Held in Durban**

Reportable

Case no: D 478 / 14

In the matter between:

**SUPERCARE SERVICES GROUP (PTY) LTD** **Applicant**

and

**WHITEAR-NEL, (N.O.)** **First Respondent**

**THE COMMISSION FOR CONCILIATION MEDIATION**

**AND ARBITRATION** **Second Respondent**

**MCNAMARA, CHRISTOPHER JEROME** **Third Respondent**

**Heard:** **20 April 2016**

**Delivered:** **16 November 2016**

**Summary: Review of an award - jurisdictional issue – a set of facts may give rise to separate and distinct causes of action – unfair labour practice proved – compensation appropriate – application dismissed.**

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**JUDGMENT**

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CELE J

Introduction

[1] The Applicant seeks to have an arbitration award dated 22 May 2014 issued in this matter by the First Respondent reviewed, set aside and substituted in terms of section 145 of the Labour Relations Act.[1] The Applicant seeks a substitution to the effect that the Third Respondent's claim of unfair labour practice be dismissed or that the Third Respondent is not entitled to any relief. In the alternative the Applicant seeks a remittal of the matter to the Second Respondent for a *de novo* arbitration hearing before a different Commissioner. The application was opposed by the Third Respondent in whose favour the arbitration award was issued.

Background Facts

[2] The Applicant was unable to file a transcript of the arbitration proceeds as no electronic recording appears to have been done. The absence of the transcribed record of the arbitration proceedings has not been relied on as a ground for review. In any event, by and large the facts of this matter are common cause as discernible from the assailed award. A summary of these facts has been outlined by the Applicant and the Third Respondent has taken no issue for that summary. Accordingly, I shall allow myself to be guided by that summary, thanks to the Applicant.

[1] Act Number 66 of 1995 hereafter referred to as the Act.

[3] The Applicant had a service agreement with Treverton Schools ("Treverton"). The Third Respondent was deployed by the Applicant, in terms of this service agreement, as the maintenance manager at Treverton College. The Third Respondent was at all relevant times employed by the Applicant while he worked at Treverton and with their staff. It was therefore critical that a proper working relationship be maintained and cultivated between the Third Respondent and Treverton staff.

[4] On 9 October 2013, an altercation took place between the Third Respondent and a Treverton staff member, Mr Dave Purdon ("Mr Purdon"). Mr Purdon contended that the Third Respondent threatened him. He then lodged a complaint about that with his employer, Treverton. This complaint was forwarded to the Applicant's Regional Manager, Mr Mariska Van Heerden ("Mr Van Heerden") by the Treverton headmaster. The Applicant conducted an investigation into this complaint, which was done by one of the Operations Managers, Mr Wessel Louwrens ("Mr Louwrens"). In the course of October 2013, Mr Louwrens conducted various interviews to gather facts about the incident, and concluded his investigation on 28 October 2013. On 29 October 2013, and pursuant to the investigation, it was decided to suspend the Third Respondent pending a disciplinary hearing to be held on 6 November 2013, on a change of gross insubordination.

[5] The disciplinary hearing did convene on 6 November 2013. It was presided over by the General Manager of outsourcing services of the Applicant, Mr Andre Roodt ("Mr Roodt"). The Third Respondent made several submissions to Mr Roodt in the hearing as to why the Third Respondent believed the disciplinary hearing should not proceed. Mr Roodt adjourned the proceedings to inter alia consider these submissions. On 7 November 2013, the Third Respondent made further written submissions to Mr Roodt, in support of his contentions. Mr Roodt answered those submissions on 14 November 2013. In a nutshell, Mr Roodt accepted that proper procedures had not been followed beforehand and he was of the view that the matter should have been attended to differently, and should

have been dealt with in a meeting with the Regional Manager. Mr Roodt stated that his task was to assess the risk caused by the incident and decide on the required steps to correct the situation. He proposed what he called a "facilitated intervention" to try and resolve the matter and he concluded by uplifting the Third Respondent's suspension and instructed him to resume his normal duties on 15 November 2013.

[6] The Third Respondent then reported for work on 15 November 2013, as instructed. This resulted in a revolt from Treverton, and a protest by Mr Noel Coetzee ("Mr Coetzee") from Treverton who was then sent to Mr Roodt on the same date. Mr Coetzee complained about the Third Respondent's return to work and the fact that the affected staff from Treverton did not testify in the disciplinary hearing against the Third Respondent. Mr Coetzee took issue with formal disciplinary proceedings not actually having been conducted in respect of the Third Respondent. Mr Coetzee complained, saying that the Third Respondent was a renegade, a law unto himself, and did not respect authority. The Applicant was asked to transfer the Third Respondent somewhere else.

[7] On 18 November 2013, the Third Respondent was then asked by Mr Roodt not to report for work until Mr Roodt could meet with Treverton to try and resolve the matter. The Third Respondent complied. Mr Roodt met with all the relevant staff from Treverton on 19 November 2013 to try and resolve the matter. It was agreed that the disciplinary proceedings would continue and that the Third Respondent would remain on paid suspension. It was agreed that the relevant staff from Treverton would be given the opportunity to participate in the disciplinary proceedings. On 20 November 2013, the Third Respondent was then formally informed not to report for work pending the conclusion of the disciplinary proceedings, which were also scheduled to resume on 22 November 2013.

[8] The Third Respondent objected on 21 November 2013 to the reconvened disciplinary proceedings, and raised several preliminary issues. One being that Mr Roodt was not impartial. Mr Roodt said that the Third Respondent was to

raise all his issues in the disciplinary hearing itself. The disciplinary proceedings convened on 22 November 2013. The Third Respondent attended and raised all his preliminary objections, saying that he would not participate on the merits of the disciplinary hearing. Mr Roodt, having considered the submissions, decided to withdraw from the disciplinary proceedings.

[9] On 28 November 2013, the Third Respondent was issued with a fresh notice to attend a disciplinary hearing to be held on 2 December 2013, *de novo*, before a new chairperson. On the following day and in response to receiving that notice, the Third Respondent asked for further particulars to the charges, which were provided to him. The Third Respondent also lodged a grievance, contending that the pending disciplinary proceedings were founded on harassment, victimization, abuse and intimidation, and constituted discrimination as contemplated by the Employment Equity Act, (EEA).[2] The Third Respondent was informed that he had to attend the disciplinary hearing on 2 December 2013, and to raise any issue he wanted to before the chairperson for determination.

[10] The disciplinary hearing convened on 2 December 2013 before a new chairperson, Ms Carmen Gaillard ("Ms Gaillard"). Ms Gaillard considered the Third Respondent's submissions. She decided that the contentions by the Third Respondent about issues relating to the prior disciplinary proceedings on 6 and 22 November 2013 had to be dealt with as a separate issue, and that she first would focus on the substance of the charge against the Third Respondent. She considered the merits of the charge, and concluded that the Third Respondent was not guilty of the charge against him.

[11] Following this disciplinary hearing's outcome, the Applicant briefed Treverton accordingly, and advised that the Third Respondent had then to return to work. Mr Coetzee from Treverton answered that the matter was "under review" and under no circumstances was the Third Respondent allowed to return to work until the Applicant heard from him. Then on 15 December 2013, Mr Coetzee informed

[2] Act 55 of 1998.

the Applicant that it had been decided to allow the Third Respondent back on site. As 16 December 2013 was a public holiday, the Third Respondent was instructed to, and did resume his normal duties at Treverton on 17 December 2013. However, the unfortunate upshot of all of the above is that Treverton gave notice of termination of the contract with the Applicant.

[12] The Third Respondent's grievance still had to be considered and concluded. A grievance hearing was held on 21 January 2014. In the grievance, the Third Respondent expressed his difficulties with Mr Roodt. The Third Respondent was informed that there simply was nothing further to be done in the matter, and all parties were to do their best to retain good relationships with Treverton. The Third Respondent was not satisfied and he then referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in February 2014, asking for compensation. The matter came before the First Respondent, as arbitrator, who found that the Applicant had committed an unfair labour practice towards the Third Respondent and awarded him four months' salary in compensation. It is this award that forms the subject matter of these proceedings.

Chief Findings of the Commissioner.

[13] The findings of the Commissioner were made in relation to four identified issues, namely:

I. Failure to follow the disciplinary code;
II. Fairness of the suspension;
III. Effect of suspension on an employee and
IV. Determination of the appropriate remedy.

Failure to follow the disciplinary code

[14] While the provisions of a code may either be discretionary or peremptory, upon a consideration of clause 4.1 and the wording of the code, the overall context and evidence of the intention of the parties, the provisions of the code were found by

the Commissioner to be peremptory. A breach of the peremptory provisions of the code was found to give rise to a civil claim for breach of a contract. The statutory fairness of the suspension and disciplinary procedures followed by the employer were found to be issues for consideration.

[15] A consideration of these issues included a finding whether the breach was material such as to render the actual procedure followed unfair and whether the employer had a legitimate justification for deviating from the code. The Commissioner found that there were numerous serious breaches of the disciplinary code, for example, the initial notice of suspension was not issued by a person in authority over the employee and the employer could not be reasonably said to have been satisfied that it would be unsafe or undesirable for the employee to continue with his duties. Further, the employee was not fully apprised of the complaint against him initially, nor was he given a chance to furnish representations on why he was not to be suspended on both occasions. The disciplinary action was instituted way outside the time limits prescribed and the employee was not properly informed of the reasons for the delay. The Commissioner was not satisfied that there were good reasons for non-compliance with the code.

Fairness of the suspension

[16] The Commissioner found that precautionary suspension would be fair if the employer had a reasonable belief that the presence of the employee at the workplace would jeopardise the investigation of the alleged misconduct or endanger the safety and well-being of any other person. There must be an objectively justifiable reason to deny the employee access to the workplace. The Commissioner was not satisfied that the employer had an objectively justifiable reason for excluding the employee from the workplace as pressure from Treverton school did not constitute such a reason. A client in the position of Treverton could not effectively dictate that the employee be treated unfairly. The Commissioner was also not satisfied that the employer had a reasonable and

*bona fide* belief that the employee had committed serious misconduct. If the matter had been initially properly investigated and the employee given an opportunity to make proper representations, it would soon have been discovered that the allegations against him were groundless.

Effect of suspension on an employee

[17] The Commissioner found that the prejudice which an employee suffered as a result of an unfair suspension went beyond financial loss as it negatively impacted on an employee's reputation, dignity and job security. Suspension was a measure with serious negative consequences for an employee. The Commissioner accepted the evidence of the employee that the employee went through a psychologically scarring, embarrassing and humiliating experience as a result of the suspension.

Determination of the appropriate remedy.

[18] The Commissioner found that the relief she could order was governed by section 193 (4) of the Act which enjoined her to determine the dispute on terms which were considered reasonable including the ordering of compensation. She held that not every compensation case derived from an actually calculable loss and that where there has been no patrimonial loss, compensation will be in the form of solatium, so as to address the wrong suffered by the employee and to deter recidivism. An appropriate relief took into account the wrong suffered, the deterrence of future violations of rights and to accord fairness to all who might be affected by the relief. Such an order should be capable of execution. Other than travelling expenses, the employee was found to have suffered no patrimonial loss but his non-financial loss was found to be substantial.

Grounds for review

[19] Essentially three grounds of review were identified by the Applicant namely, absence of jurisdiction, no existence of unfair labour practice and inappropriate relief granted against the Applicant.

Jurisdiction

[20] The issue raised by the Applicant on jurisdiction was firmly founded on what constituted the real issue in dispute. The Applicant contended that Third Respondent's case was firmly founded on harassment and discrimination. This, the Applicant said was evident from the following:

1. When suspended for the first time, the Third Respondent lodged a written complaint about it. In this complaint, he said, inter alia, that there were 'external forces' working behind the scene which led to his suspension;

2. In his grievance dated 29 November 2013, the Third Respondent accused the Applicant of harassment. He said that the charges and the disciplinary proceedings brought against him were founded on harassment. The Applicant's attention was specifically drawn by the Third Respondent to the discrimination provisions in the EEA, and the fact that such harassment constituted unfair discrimination in terms thereof. The Third Respondent demanded that the Applicant remove all these causes of harassment. As far as the Third Respondent was concerned, the disciplinary proceedings were part of that harassment;

3. On 1 December 2013, the Third Respondent stated that his suspension was uplifted on 15 November 2013, and that should have been the end of the matter. The Third Respondent contended that when the proceedings recommenced on 22 November 2013, that constituted harassment. In particular, the Third Respondent said: 'My grievances are not in response to any disciplinary charges as this alleged occurrence was ruled on on the 14 November thereby finalising the matter. My grievance is about the harassment I am being subject to …..' The Third Respondent specifically says that his grievance is to stop harassment in the workplace;

4. When the Third Respondent finally returned to work on 17 December 2013, he did so without reservation and without referring an unfair

suspension dispute. And this made sense, considering that the Third Respondent said his grievance was not about the disciplinary charges, but about harassment;

5. The Third Respondent's grievance hearing follows on 21 January 2014. It is clear that the contents of the grievance only concerned what the Third Respondent considered to be harassment. When the harassment was not resolved in the manner the Third Respondent wanted, he said he would pursue it further;

6. When the Third Respondent then referred his dispute to the CCMA on 5 March 2014, no suspension existed. The Third Respondent said in the referral that the dispute arose on 6 February 2014. But he was not suspended on 6 February 2014. This date corresponded with the outcome of his grievance hearing of 21 January 2014. The dispute could thus not be about suspension. Further, the referral specifically recorded that the issue was one of discrimination under the EEA.

[21] The Applicant contended that the above being the case, and on the facts, the matter could only be pursued to the Labour Court for adjudication as a discrimination/ harassment claim in terms of the provisions of the EEA.

[22] In response to the submissions of the Applicant on this issue the Third Respondent said that it was trite that the same set of facts might give rise to two or more distinct causes of action. That being the case, the litigant who instituted an action was at liberty to elect which cause of action he or she intended to rely upon. The Third Respondent referred his dispute to the Second Respondent as an unfair labour practice. The certificate of outcome issued upon the conclusion of the conciliation process categorised the dispute as being an unfair labour practice. The Third Respondent's request for arbitration reflected the nature of dispute as being an unfair labour practice. The submission is that, based upon the aforementioned, the Second Respondent was obliged to assume provisional jurisdiction to determine, notwithstanding the Third Respondent's classification of

the case, whether or not she did enjoy jurisdiction.

[23] The contention was further that the record reflects that the dispute which was arbitrated by the Second Respondent was indeed one pertaining to an unfair labour practice and that in the words of the Applicant in these proceedings:

> 'The Applicant [the Third Respondent in this Honourable Court] contends that his suspension from work and the subsequent disciplinary action was an Unfair Labour Practice.'

[24] The Third Respondent said that this utterance was reiterated by the Applicant when it summarised what it understood the Third Respondent's complaints to have been. The Third Respondent's heads of argument bear out the nature of his dispute as having been an unfair labour practice. The allegations made by the Third Respondent as to what the specific complaints, which were addressed by him at the arbitration, save that the Applicant disputed the veracity of the complaints made, were not disputed to have been made by the Third Respondent in reply.

[25] In *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another,*[3] it was held as follows:

> 'It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. It is also important to bear in mind that parties may modify their demands in the course of discussing the dispute or during the conciliation process. All of this must be taken into consideration in ascertaining

[3] (2003) 24 ILJ 305 (CC) at para.52.

the true nature of the dispute.'

[26] Therefore, in deciding what the real dispute between the parties is, a Commissioner is not necessarily bound by the description of the dispute as given by legal representatives as the labels that the parties attach to a dispute cannot change its underlying nature. A Commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by a party and the evidence presented during the arbitration. As it were, the true dispute may only emerge once all the evidence has been led.[4]

[27] The absence of the arbitration transcript is now felt. There is no telling what the parties said in their opening remarks when called upon to give a summary of the issues that the Commissioner was called upon to resolve. There is no pre-arbitration minute filed and there is no record of what evidence was led in respect of the documents filed in the bundles discovered. It becomes difficult to determine why issues pertaining to discrimination, victimization and harassment featuring in the documents filed were never testified on, as shown by no reference thereto in the award. What remains clear though is that:

a) The Third Respondent referred his dispute to the Second Respondent as an unfair labour practice;
b) The certificate of outcome issued upon the conclusion of the conciliation process categorised the dispute as being an unfair labour practice;
c) The Third Respondent's request for arbitration reflected the nature of dispute as being an unfair labour practice and
d) The award issued addressed the issue of the unfair labour practice.

[28] The Applicant has correctly pointed out that when the Third Respondent referred his dispute to the CCMA on 5 March 2014, no suspension existed. The Third Respondent said in the referral that the dispute arose on 6 February 2014 when in fact he was not suspended on 6 February 2014. This date corresponded with the outcome of his grievance hearing of 21 January 2014. That no suspension

[4] *See CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC).

existed on 5 March 2014 did not deprive him of a right to refer an unfair labour practice dispute relating to suspension. No time frame militated against a referral of that dispute. In my view, the grievance document has no reference to an unfair suspension. It cannot then properly be argued that the issue of his suspension had clearly been abandoned by the Third Respondent. The waiver of the suspension issue has not really been argued in this matter. For whatever reason, the Third Respondent was therefore, at liberty to abandon the discriminatory and harassment issues during the arbitration and to stick to the suspension issue. This might even have come about by the agreement of both parties, seeing from the award, that the Applicant's representative does not appear to have raised the issue for deliberation and resolution. After all, a set of facts may give rise to separate and distinct causes of action. In this respect Court held *in Fedlife Assurance Ltd v Wolfaardt*[5] that:

> 'Whether a particular dispute falls within the terms of section 191 depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least it is a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the "fairness" of the dismissal is the subject of the employee's complaints. Where it is not, and the subject of the dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about..'[6]

[29] The Applicant has contended, inter alia, that on 1 December 2013, the Third Respondent stated that his suspension was uplifted on 15 November 2013. From that, the Applicant said that it should have been the end of the matter. I do not agree. Nowhere in this statement does the Third Respondent concede that the suspension was fair or that he accepted it on any other ground. It remained open to him to challenge it as he subsequently did. On the jurisdictional ground of review therefore, the Commissioner has not been shown to have acted wrongly

[5] 2002 (1) SA 49 (SCA).
[6] The issue of the lawfulness of the dismissal has however been recently resolved by the Constitutional Court in *Steenkamp and Others v Edcon* Limited 2016 (3) BCLR 311 (CC).

by assuming jurisdiction and dealing with the unfair labour practice. This ground of review must therefore fail.

The unfair labour practice.

[30] The Applicant has correctly said that the suspension of the Third Respondent was not a disciplinary action but was a precautionary suspension. The Applicant contends that this suspension cannot qualify as unfair suspension as envisaged in section 186 (2) (b) of the Act. The submission is that, because this is not a case of suspension as disciplinary action, this then only leaves the issue of suspension per se as the first part of Section 186(2) (b). Whilst holding operation suspension is clearly an unfair labour practice, the submission is that it is the continued existence of suspension that is contemplated by this part of the unfair labour practice definition. Where suspension as a disciplinary action short of dismissal exists, then it would be comfortably covered under the second part of Section 186(2) (b). The first part of Section 186(2) (b), being unfair suspension per se, must therefore be something else, and this something else is the continued existence of suspension under circumstances that would be unfair.

[31] I shall assume the correctness of the approach adopted by the Applicant save to add that the "something else" therein referred to cannot be limited to the continued suspension but should include other considerations surrounding the suspension, such as the violation of the provisions of the disciplinary code that the employer may have set for itself.

[32] I now have to apply the adopted approach to the given facts. Under the subtopics fairness of the suspension and effect of the suspension in the award the Commissioner identified the factors for consideration and applied them against the given facts before her. She clearly conducted a proper enquiry into the issues before her and in the absence of the record it cannot be reasonably said that she committed any defect as envisaged in section 145 of the Act. From the given facts, I conclude that the decision she reached on this issue cannot be said to be the one that a reasonable decision maker could not reach.

Inappropriateness of relief granted against the Applicant.

[33] The submission was that an award of four months' salary in compensation was wholly inappropriate in this case. The Applicant relied on various issues such as the fact that the Third Respondent was on paid suspension; the suspension was for a short period and that it was precautionary suspension as the employee was always subject to disciplinary proceedings. The Commissioner applied her mind to these issues but went further. She found that the prejudice which an employee suffered as a result of an unfair suspension went beyond financial loss as it negatively impacted on an employee's reputation, dignity and job security. The Commissioner accepted the evidence of the Third Respondent that he went through a psychologically scarring, embarrassing and humiliating experience as a result of the suspension. To her, an appropriate relief took into account the wrong suffered, the deterrence of future violations of rights and to accord fairness to all who might be affected by the relief.[7] Again she embarked on an appropriate enquiry on the issue and the conclusion she reached is not the one which a reasonable decision maker could not reach. Yet again, this ground must fail.

[34] As I reflect on all issues raised, including the aspect of costs, when the relations between the parties still subsist, I conclude that the following is an appropriate order:

34.1 The review application in this matter is dismissed;

34.2 The Applicant is to pay the costs thereof.



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Cele J

Judge of the Labour Court of South Africa.

[77] For the appropriateness of the issues she considered see for example *SA Post Office Ltd v Jansenvan Vuuren No and Others* (2008) 29 ILJ 2793.

APPEARANCES:

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| FOR THE APPLICANT: | Mr. S Snyman |
| | Instructed by Snyman Attorneys |
| FOR THE RESPONDENT: | Adv. K Allen |
| | Instructed by Stirling Attorneys |