THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1026/15

In the matter between:

INDEPENDENT MUNICIPAL AND ALLIED

TRADE UNION OBO N DANDALA **Applicant**

and

EKURHULENI METROPOLITAN MUNICIPALITY **First Respondent**

M TSATSIMPE N.O **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Third Respondent**

T SIDZAMBA N.O **Fouth Respondent**

Heard: **08 June 2016**

Delivered: **24 June 2016**

Summary: A review application of an award issued in terms of section 24 of the LRA. The approach to be adopted by the reviewing court in matters involving interpretation and application of a collective agreement.

The import and purpose of clause 6.3 of the South African Local Government Bargaining Council Disciplinary Procedure and Code Collective Agreement of 10 April 2010 considered. Held (1) The interpretation of the clause by the second respondent cannot be faulted. (2) The review application is dismissed with no order as to costs.

JUDGMENT

MOSHOANA, AJ

Introduction

[1] This is an opposed application to review and set aside an arbitration award issued by the second respondent in terms of which he found that the first respondent has correctly interpreted and applied clause 6.3 of Disciplinary Code and Procedure. Consequently, the applicant's case was dismissed.

Background facts

[2] Dandala commenced employment with the first respondent on 1 January 2006 as a cashier clerk. Around July 2014, certain allegations of misconduct arose. On 25 July 2014, Dandala was served with a letter alleging that on various occasions, he performed 141 transactions of registrations improperly. An investigator was appointed to investigate the aforesaid allegations.

[3] On 19 September 2014, the investigator issued his report. Following the report, a decision was made to have Dandala charged with misconduct. On 22 October 2014, Dandala was served with a charge sheet, which also invited him to a hearing that was scheduled on 30 October 2014. On this day, the hearing was postponed due to the absence of Dandala's legal representative.

[4] On 20 November 2014, the hearing was to commence before the fourth respondent. However, the present applicant raised a point in limine regarding the unlawfulness of the hearing on account of the first

respondent's alleged failure to comply with clause 6.3 of the collective agreement. The point was dismissed. Aggrieved thereby, the applicant referred a dispute to the third respondent on 26 November 2014. The second respondent was appointed to arbitrate the dispute. On 20 May 2015, the second respondent issued an award, which became the subject matter of this application.

Grounds of Review

[5] The applicant alleged that the arbitration award is riddled with irregularities spelled out as follows:

5.1 The second respondent misconstrued the nature of the dispute by finding that the issue was whether the first respondent had instituted the disciplinary process against Dandala outside the prescribed three months period. In the applicant's view, the true issue was whether the first respondent had commenced the disciplinary hearing against Dandala within the prescribed three months period. The applicant contended that there is a difference between instituting the disciplinary process and commencing disciplinary hearing, which is a step within the disciplinary process, which difference the second respondent failed to appreciate.

5.2 The second respondent misconstrued the evidence of Dandala, who only testified about starting of a disciplinary hearing as opposed to instituting it within three months.

5.3 The second respondent misconstrued the case of Dandala, which was simply that the first respondent commenced a disciplinary hearing after the expiry of the three months as opposed to being charged outside the prescribed period.

5.4 The second respondent misconstrued Dandala's evidence when she stated that he was suspended pending investigations. On the contrary, Dandala was never suspended.

5.5 She materially omitted the concession by Pillay to the effect that the first respondent was aware of the alleged misconduct on 25 July 2014, thereby committing a gross irregularity.

5.6 By not applying the literal interpretation of clauses 6.1 and 6.3, she missed the purpose of the clause.

5.7 By finding that the applicant's interpretation would result in the Municipal Manager being forced to charge by mere existence of allegations led her to arrive at a different conclusion.

5.8 She committed a gross error when she found that the literal meaning does not reflect the objective and the intention of the collective agreement. She committed another gross error when she found that literal meaning could be departed from.

5.9 The second respondent stretched the meaning of clause 6.3 when it is not capable of being so stretched.

5.10 Her failure to apply the literal and grammatical meaning of clause 6.3, she came to a decision, which a reasonable commissioner could not reach.

Evaluation

[6] There is no dispute between the parties that the dispute is one of interpretation and application of a collective agreement within the contemplation of section 24 of the Labour Relations Act. In this matter, the second respondent upheld the interpretation of the first respondent. In clause 2.2 of the award, the second respondent described the issue thus: 'I am required to determine whether the respondent incorrectly interpreted and applied clause 6.3.' At the end, the second respondent found that the first respondent did not interpret or apply the clause incorrectly.

[7] This being a review application, the test is one of considering whether the award is justifiable and reasonable. The question is what approach to

adopt in matters involving interpretation and application of a collective agreement. The Labour Appeal Court in *SAMWU v SALGBC and Others*,[1] stated the following:

> [10] The question we must answer in this appeal is not whether the award in issue is correct, as correctly pointed out by Moshoana, AJ, but whether the commissioner acted fairly, considered and applied his mind to the issues before him. This is in view of the whole basis of the appellant's attack of the award, i.e the manner in which the commissioner arrived at his award. It is indeed so that it is in keeping with the reasonability requirement of LRA arbitration awards to also focus on how the commissioner approached the material before him as well as the analytical process he subjected that material when making the award.
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> [18] It is important to point out, as stated by the court a quo, which the essence of the appellant's argument is that the commissioner came to a wrong conclusion. This is clearly an argument that presupposes an appeal rather than a review.'

[8] In the light of the above approach, it is not for this court to determine that the conclusion was wrong. The second respondent was tasked to interpret the clause on behalf of the parties. She did so. In that way, she performed the task, which the parties gave her. She has rendered a lengthy and detailed award. At paragraph 5.13 of the award, she concluded thus:

> 'My interpretation of clause 6.3 is that once a Municipal Manager has concluded that there is a *prima facie* cause to charge an employee, s/he may charge an employee with misconduct. If a decision is made to charge an employee, his/her disciplinary hearing should proceed within three months from the date the relevant Municipal Manager would have satisfied him/herself that there is prima facie cause to charge'

[1] [2012] 4 BLLR 334 (LAC) at paras 10 and 18.

[9] The issue as pointed out is not whether the interpretation is wrong or right but whether it is one a reasonable decision maker can arrive at. I find no basis to conclude that the interpretation is one that a reasonable decision maker cannot reach. This court in *South African Municipal Workers Union obo Dhlamini and Others v Mogale City Municipality and Another*,[2] had the following to say:

> '[36] Mr Hulley has also raised the point of efficacy. The contention is based on the fact that there is simply no basis of determining beforehand how long an investigation may take or what misconduct by employees it may actually reveal. In the circumstances, according to Mr Hulley, it simply cannot be accepted that aware in clause 6.3 could mean any inkling by the employer no matter how remote, of possible misconduct by the employee.'

[10] To my mind, the interpretation by the second respondent cannot be faulted. Applying the mischief approach as opposed to literal interpretation does not suggest that the award is neither justifiable nor capable of reasonable justification. In the light of this, the application is bound to fail. For completeness sake, I find it important for the court to give its own interpretation of clause 6.3.

[11] Clause 6.3 reads thus:

> 'The employer shall proceed forthwith or as soon as reasonably possible with a disciplinary hearing but in any event not later than three (3) months from the date upon which the employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for condonation to the relevant Division of the SALGBC.'

[12] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[3] it was held that interpretation is a process of attributing meaning to words by having regard to the context and the document as a whole. Clause 4.1

[2] [2014] 12 BLLR 1236 (LC) at para 36.
[3] [2012] 2 All SA 262 (SCA), 2012 (4) SA 593 (SCA) at para 18.

provides that the purpose of the Disciplinary Code is to establish a fair, common and uniform procedure for the management of employee discipline. It is clear from this clause that one of the purposes of the Code is to attain fairness. To my mind it is unfair for any party to expect an employer to proceed with discipline without investigations, which would lead to a prima facie cause. To limit the interpretation of the clause to an inkling is inappropriate and does not accord with the tenets of fairness.

[13] The applicant, before me, contends that clause 6.3 suggest that a disciplinary hearing as in dealing with the merits must proceed from the day when the accusations of misconduct are brought to light. In its mind, the hearing only proceeded on 20 November 2014, which is outside the three months period. The question then becomes what does 'proceed with a disciplinary hearing' mean? According to the applicant, charging an employee is not tantamount to proceeding with a hearing. I cannot agree.

[14] The phrase disciplinary hearing has not been defined in the Code. However, if regard is had to other clauses, it is clear that before a hearing can proceed, the Municipal Manager must constitute it by appointing a suitable person to serve as the presiding officer. Therefore, once a presiding officer is appointed, a disciplinary hearing is constituted. Once that is done a prosecutor shall be appointed. He or she must formulate and serve the charges to be brought against the employee within five days of appointment. Thereafter, the employee must be given notice of misconduct. Clause 6.10 employs the term 'commence.' This clause spells out the actual sitting of the hearing. The applicant seems to confuse proceeding with commencement.

[15] Proceeding with a disciplinary hearing starts when the Municipal Manager appoints a presiding officer. There can be no doubt in my mind that once a presiding officer is appointed an employer will be proceeding with a disciplinary hearing. In my judgment, the processes that follow after the appointment of the presiding officer is all part of proceeding with

the disciplinary hearing up to and including the actual commencement of the sittings. Therefore, the relevant outer date is the date on which the presiding officer was appointed and not the date on which the hearing sits as contemplated in clause 6.10. On the papers before me, it is not clear when was the presiding officer appointed. However, it must have been before the notice of misconduct, which was served on the employee on 22 October 2014.

[16] Therefore, even if I accept that the first respondent became aware of the allegations of misconduct on 25 July 2014, when it appointed the presiding officer, it was within the prescribed three months period. I am in agreement with my Brother Molahlehi, J in the unreported matter of *Ekurhuleni Metropolitan Municipality v SALGBC and Others*[4] when he said:

> '[15] It seems to me that the question of when an employer becomes aware of the misconduct in terms of clause 6.3 of the collective agreement depends on the specific facts and the circumstances of a given case.'

[17] This suggests, correctly so in my view, that a date of being aware is not capable of being fixed to a specific event. Such that it is reasonable to suggest, as the second respondent did this matter, that a date is one when the Municipal Manager forms a *prima facie* cause. Of course another date could be when an employer through a responsible officer hears about a clear cut misconduct, which on the face of it does not require investigations to determine whether it constitute one or not.

[18] In summary, the award of the second respondent is reasonable and capable of justification. The first respondent proceeded with the disciplinary hearing within the prescribed period when it appointed the fourth respondent. The processes that followed after the appointment of the fourth respondent up to and including the commencement of the

[4] Case no: JR 470/31 dated 09 January 2015 at para 15.

sitting, which is 30 October 2014, are all part of proceeding with the disciplinary hearing. Accordingly, there is no unlawfulness involved.

[19] Accordingly, I am of a firm view that the award is not reviewable. It perfectly falls within the bounds of reasonableness.

Order

[13] In the results, I make the following order:

1. The application for review is dismissed.

2. There is no order as to costs.

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Moshoana, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	Mr V G Mkwibiso of IMATU
For the first Respondents:	Advocate T Mabuda
Instructed by:	Attorney T Chivizhe of Ramatshila-Mugeri Attorneys, Randburg.