THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1099/13

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION **First Applicant**

J N MOHAMED **Second Applicant**

and

NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Second Respondent**

ADV T L MABUSELA N.O **Third Respondent**

Heard: **09 June 2016**

Delivered: **07 July 2016**

Summary: An opposed review application in terms of which the applicants seek to review and set aside an award issued by the third respondent. He found the dismissal of the second applicant to be

procedurally and substantively fair. Held: (1) a dismissal ought to be justified by the misconduct that led to a dismissal. (2) A commissioner is not at large when it comes to the reason for the dismissal. (3) Failure to consider the misconduct that led to a dismissal amounts to an irregularity and non-compliance with section 138 of the Labour Relations Act. (4) Award reviewed and set aside. (5) The dismissal of the second applicant is unfair. The first respondent to reinstate the second applicant. (6) The first respondent to pay the costs of the application.

JUDGMENT

MOSHOANA, AJ

Introduction

[1] This is an opposed application to review and set aside an arbitration award in terms of which the panellist found the dismissal of the second applicant to be procedurally and substantively fair and dismissed the applicant's case with no order as to costs.[1]

Background facts

[2] The second applicant was employed by the first respondent as a Demand and Acquisition clerk from August 2008. On or about 15 February 2012, the second applicant entered the filing room in the Finance Department in order to source certain documents allegedly intended for the former councilors of the first respondent.

[3] On 25 May 2012, the second applicant was suspended pending a disciplinary hearing. At the same time, she received a notice to attend a disciplinary hearing scheduled for 12 June 2012. A charge sheet was annexed spelling out the allegations of misconduct.[2] On 15 November

[1] Paginated Bundle at 34, para 6.1-6.3 of the award.

[2] The first charge was captioned 'unacceptable behaviour' in that on or about 15 February 2012 and during working hours, the employee entered the finance registry office and on her own searched for documents purporting to allegedly prove that the CFO lodged travel claims when he in fact did not have a drivers licence. The employee stated whilst conducting the search that she had been requested to source information by former councillors; who ostensibly needed the

2012, one Mogapane Abel Metswamere, the chairperson of the hearing, made a finding.[3] On 22 November 2012, the Municipal Manager advised the second applicant of her dismissal by way of a letter.[4] Aggrieved by her dismissal, the second applicant duly assisted by the first applicant referred a dispute to the second respondent. In the referral forms, the complaint was structured thus: 'the applicant is dismissed based on allegations of acts of gross dishonesty and gross insubordination.'[5]

On 19 February 2013, the third respondent having been duly appointed conducted an arbitration. After hearing evidence, the second respondent issued an award under attack on 5 April 2013.

Grounds of Review

[4] The applicants detailed the grounds of review thus:

4.1 The applicants submit that the Commissioner committed a gross misconduct in that he came to a conclusion a reasonable commissioner could not have reached.

4.2 He failed to apply his mind to the argument and evidence put forward by first and the second applicants pertaining to the procedural fairness of the second applicant's dismissal.

4.3 Dismissal was harsh in the circumstances, due to the fact that the second applicant had never been disciplined for any offence prior to this instance.

information to plot against the current administration. Such conduct was destabilizing and unacceptable. It is contrary to the continuation of a normal relationship. (My underlining).

[3] I therefore find the Accused guilty as charged on the charge of UNACCEPTABLE CONDUCT- and recommend the sanction of dismissal.

[4] Be informed that the Chairperson in the disciplinary hearing involving yourself and Ngaka Modiri Molema District Municipality has recommended your dismissal from the municipality and the Municipal Manager has approved such. Your dismissal will take effect from the date in which the Municipal Manager approves it which is 19 November 2012.

[5] It is unclear where the referring party obtain the reason of gross dishonesty and gross insubordination. She did not face those charges, neither was she dismissed for that. In any event referral forms do not amount to pleadings.

4.4 The first respondent failed to discharge the onus put on it to prove that dismissal was for a fair reason and that it followed fair procedure.

4.5 The first respondent failed to prove that the employment relationship with the second applicant had deteriorated to such an extent that continued employment would be intolerable.

4.6 The commissioner misdirected himself when evaluating the evidence put forward by the first respondent and came to the conclusion which a reasonable commissioner could have reached faced with the same facts and evidence.[6]

4.7 It is clear that the Commissioner like the chairperson of the disciplinary enquiry came to a conclusion that was unsupported by the facts and evidence before them, the second applicant was not charged with gross dishonesty and or gross insubordination, however she was ultimately found guilty of those offences.[7]

Evaluation

[5] In argument, Mr Ngako for the applicants sought to elucidate the grounds by amongst others submitting that since the second applicant was never charged and found guilty of insolence, an inquiry into insolence was an inquiry which was misguided. Realising that a charge of unacceptable misconduct cannot justify a dismissal, the second respondent deemed it necessary to find a reason to justify the dismissal.[8] For some inexplicable

[6] Excerpts from the award quoted by the applicants omitted in this judgment.
[7] As pointed out earlier, it was the applicants in their referral documents that introduced as it were a guilty finding on dishonesty and insubordination. The charge sheet and the findings of the chairperson were dealt with earlier.
[8] He said: 'it is further worth noting that in the Labour Relations Act there is no charge referred to an unacceptable behaviour. This may be a charge emanating from the collective agreement of the parties. This charge however is closely related to the charge of insolence and insubordination, although the LRA has distinguished between the two. I therefore cannot find any irregularity in the procedural aspect of the hearing.

reasons, the second respondent concluded that the second applicant is guilty of insolence.[9]

[6] Suffice to mention that the Labour Relations Act does not define nor described offences. In terms of section 188 of the Act, a dismissal is unfair if the employer fails to prove that the reason is related to an employee's conduct. In my view, what the first respondent ought to prove to be fair is the dismissal which has happened. An arbitrator, using his own sense of fairness, determines afresh whether the dismissal as an act/event is fair. In *SAB Ltd v CCMA and Others,*[10] Steenkamp, J said the following:

> 'In my view, the commissioner's view can best be summarised thus: The employer decides to dismiss. The commissioner conducts an arbitration *de novo*. In the light of the totality of circumstances, established by the evidence at arbitration the commissioner must then decide whether the decision to dismiss was fair. In doing so, it is the commissioner's own sense of fairness that must prevail. There can be no deference to the employer.'(My own underlining)

[8] In *Wasteman Group v SAMWU and Others,*[11] Davis, JA held thus:

> 'The Commissioner is required to come to an independent decision as to whether the employer's decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the commissioner.'

[9] In *Fidelity Cash Management Service v CCMA and Others,*[12] Zondo, JP, as he then was, held thus:

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[9] He said: 'It is clear from the applicant's action that whether or not she committed the offence, she did not treat the CFO, being the senior, with respect. This act satisfies the definition of insolence as described in the Labour Relations Act.
[10] (2012) 33 *ILJ* 2945 (LC) at para 26.
[11] [2012] 8 BLLR 778 (LAC) at 781D.
[12] [2008] 29 *ILJ* 964 (LAC) at para 32.

> 'It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where at the time of dismissal the employer gave a particular reason as the reason for dismissal in order to hide the true reason such as union membership. In such a case the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that the employer gave for the dismissal but on the basis of the true reason for dismissal.'

[10] In *Absa Brokers (Pty) Ltd v Moshoana NO and Others,*[13] the court, per Nkabinde, AJA, had the following to say:

> 'However, since he was not charged with allegations of making a false declaration in clause 16 and since this was not the reason for his dismissal; the declaration cannot be taken into account for the purpose of the determination of the fairness or otherwise of the dismissal. The substantive fairness or otherwise of the employee's dismissal must be assessed with reference to the reason for which he was dismissed.'

[11] To my mind, the second respondent committed misconduct when he determined the fairness with reference to a misconduct of insolence. The second applicant was charged and dismissed for the so-called unacceptable misconduct. The second respondent should simply have resorted to Schedule 8 Item 7. It is apparent that the second respondent was not convinced that the second respondent contravened a rule or standard regulating conduct in, or of relevance to, the workplace. He should have ended there and not proceed to create a misconduct as it

[13] [2005 10 BLLR 939 (LAC) at para 37.

were. In *Palluci Home Depot (Pty) Ltd v Herskowitz and others*[14], the Court stated the following:

> 'Also, as alluded to earlier, the Commissioner failed to apply his mind to the fact that the charge of screaming and shouting at Lambrecht could not on the facts (evidence) and the law be interpreted as insubordination in light of established authority, which requires the presence of a wilful and serious challenge to, or defiance of, the authority of the employer to found a charge of insubordination or gross insubordination…The Commissioner did not appreciate the difference, nor did he apply the relevant legal principles…'

The Court went further to say:-

> 'The Commissioner, in the current matter, made material errors in fact and law by failing to apply his mind to the distinction on the facts and the law between insubordination, and insolence in determining whether the first respondent had committed the offence of gross insubordination upon which the appellant based its decision to dismiss her.'

Further the court said:

> 'The Commissioner furthermore, in my view, misconstrued the true nature of the enquiry and his mandate in connection therewith by making a determination on aspects of the charges, which neither the chairman of the disciplinary hearing nor the appellant relied upon, at the time of the first respondent's dismissal…'

[14] Case CA21/13 delivered 12 December 2014.

[12] Mr Tema, for the first respondent, placed heavy reliance on the judgment of *National Commissioner, South African Police Service v Meyers and Others*.[15] He, however, did not bring it to the attention of the court that the portion that he so heavily relied on constituted the minority judgment. The majority, per Waglay, JP and Molemela AJA concurring, simply agreed that there was no basis to interfere with a finding that Myers committed the misconduct complained of as found by the minority judgment. On the issue of the charge sheet, the majority somewhat reasoned differently.[16] Also, he did not bring to my attention that the SCA overturned the order of the LAC.[17] The material and relevant portions of the SCA judgment seem to support the position of the LAC in the earlier judgments.[18] In the LAC, the minority disagreed with a submission that the arbitrator acted unreasonably in entertaining the alternative charge on which Meyers was acquitted at the disciplinary hearing. The minority further disagreed with an argument that in entertaining the alternative charge and formulating his own charge sheet, he acted beyond his powers. The minority disagreed with an argument that the arbitrator was unreasonable to adjudicate the matter on the basis of the new charge. Of importance in this judgment is a consideration of the reasons given by the minority in rejecting the arguments mentioned above. The minority reasoned that section 138 (1) allows consideration of an alternative charge as it allows an arbitrator to identify the real dispute between the parties. Further, it reasoned that since the hearing is a hearing *de novo*, the findings of earlier disciplinary enquiry are irrelevant. The minority relied on what Ngcobo, J said in *CUSA v Tao Ying Metal Industries and*

[15] [2012] 7 BLLR 688 (LAC).
[16] Ibid at para 98. It said: 'Before dealing with the issue of sanction, I need to re-emphasise that an employer is not and cannot be expected to frame a charge sheet in respect of a misconduct committed by an employee as one would prepare a charge sheet in a criminal trial. The importance of a so-called charge sheet in a misconduct enquiry is to set out allegation that constitutes the misconduct so that the employee is aware of the case to which he or she is required to answer. Also of little consequences is the employer's averment that the allegations constitute a number of counts of misconduct or a single count. It is the allegation that constitute the misconduct which must be considered and a conclusion arrived thereon.' (My underlining)
[17] *Myers v National Commissioner of the SAPS* (2013) 34 *ILJ* 1729 (SCA).
[18] *Ibid* at paras 13 and 30. It said: 'The judge noted correctly in my view that the appellant had not been charged with contravention of regulation 20(s) which deals with insolence and disrespect.' (Para 13) 'As observed by Ngalwana, AJ in the Labour Court, he regarded as an aggravating factor… which was irrelevant consideration in that the appellant was not even charged with contravention of regulation 20(s) which deals with insolence.' (Para 30)

Others.[19] I am unfortunately not able to agree with the reasoning of the minority for reasons that follow hereunder.

[13] The reasoning is inconsistent with what the LAC in *Absa* and *Fidelity, supra,* said. Nowhere in the judgment appears a clear expression that those judgments were wrong. To my mind, an arbitrator determines a dismissal that had occurred. Much as I agree that the arbitration is a hearing *de novo*, such does not detract from the fact that a dismissal has happened because an employer believes that an employee has committed a particular misconduct. Not all misconducts will lead to a dismissal. For that reason, a commissioner must determine amongst others whether the misconduct for which an employee has been dismissed attracts dismissal as a sanction. So if a commissioner is at large to formulate a charge for another party to the dispute, he or she would not be in a position to determine whether dismissal was appropriate. I say so because if an employee is charged and dismissed for charge X, a commissioner may and in fact is entitled to find that charge X cannot lead to a dismissal. To allow a commissioner at the altar of section 138(1) to formulate a charge that will attract dismissal as a sanction would be unfair in my mind. The other party, in particular the employee, will prepare his or her case around the misconduct that led to his or her dismissal. This much is apparent from the reasoning of the majority. Not affording parties to an arbitration a fair hearing is an irregularity.

[14] More often than not, parties to a dispute about an unfair dismissal will identify the dispute as such unfair dismissal. There is no room for quibbling about the dispute, particularly, where dismissal as a fact has happened. It seems to me that, with respect, the minority, in accepting what Ngcobo, J said, did not take into account the facts of *CUSA*. In

[19] 2009 (2) SA 204 (CC) at para 65 where he said: 'In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. 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 the union and the evidence presented during arbitration…The dispute between the parties only emerges once all the evidence is in.'

CUSA, the employer refused to comply with a wage provisions of the applicable bargaining council agreement claiming that it had been exempted from complying with the relevant provisions. The refusal gave rise to a dispute. The commissioner found that the exemption relied upon by the employer had expired and ordered the employer to comply with the applicable bargaining council agreement.

[15] Therefore, with respect, the statement of Ngcobo, J should be understood against the background of the facts in *CUSA*. There was clearly a dispute between the parties in *CUSA* as to what the real dispute was. Such even divided the SCA, in its judgment. The Learned Ngcobo, J went on to state that the commissioner considered whether there were exemptions that were currently in operation. She concluded that there were none. The question of the validity of the exemptions did not therefore arise.[20]

[16] It is indeed so that I am bound by decisions of the higher court like the LAC in this instance. Proper reading of the LAC judgment suggests to me that the majority did not subscribe to the reasoning of the minority spelled out above. Therefore, I do not find the reasoning binding on me. However, if the majority did, for reasons spelled out above, I am of a firm view that much as the decision is binding on me, it seems to have been wrongly reasoned, with respect to the aspects I differed with. Recently the LAC, in *Dikobe v Mouton N.O. and Others,*[21] said the following:

> 'In argument on appeal, an allusion was made to certain written 'rules about not taking bribes, behaving honestly, not consuming the employer's stock and not being in possession of the employer's property, which plainly the appellant must have known. However, as he was not charged with any of these felonies, reference to them is irrelevant…'[22] (my underlining)

[20] *Ibid* at para 74.
[21] Case number (JA45/2015) [2016] ZALAC 30 (15 June 2016).
[22] *Ibid* at para 14.

[17] In *Toyota SA Motors (Pty) Ltd v CCMA and Others,*[23] Zondo, J writing for the minority had the following to say:

> '124 If a commissioner does not decide whether the employee was guilty of the misconduct for which he was dismissed, he acts contrary to the requirements of s 138(1) of the LRA.…
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> 125 When an arbitrator fails, as the commissioner did, to decide whether the employee was guilty of the misconduct for which the employer had dismissed him, the arbitrator or commissioner, like the magistrate in *Goldfields Investment* case who failed to carry out an instruction of the Ordinance, fails to carry out a statutory instruction... This constitutes both a gross irregularity in the proceedings as well as misconduct justifying that the award be reviewed and set aside.'
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> 130 It must be remembered that it is the employer who bears the onus to prove that a dismissal is fair. If an arbitrator does not determine whether the employee was guilty of misconduct, the employer has no chance of showing that the dismissal is fair. In a particular case an arbitrator may find that the employee was guilty of misconduct for which he was dismissed but still finds that, nevertheless, dismissal was an unfair sanction. That this happen does not, however mean an arbitrator may fairly determine such a dismissal dispute without determining whether or not the employee was guilty of misconduct.'[24]

[18] To my mind, the decision of *Myers, supra,* cannot be followed to the extent that it gives a commissioner license to craft a charge that will justify a dismissal. In any event, the facts of this case are distinguishable. In *Myers,* the employee was charged of the misconduct but was found not guilty. In *casu*, the second applicant was never charged of insolence. In other words, it was never contemplated by the first respondent that the second applicant can be dismissed for insolence. This is a typical case of an arbitrator crafting, as it were, charges for an employer.

[23] [2016] 37 *ILJ* 313 (CC)
[24] *Ibid* at paras 124, 125 and 130.

[19] In my view, the third respondent was not entitled to find that the second applicant is guilty of insolence. His conduct amounts to an irregularity and misconduct. Nowhere does the record show that the third respondent warned any of the parties, in particular the second applicant that he is likely to adopt such a course. Typically, this amounts to latent irregularity, which vitiates the award.

[20] The third respondent did not address the question whether dismissal as a sanction was appropriate. It is the duty of a commissioner applying his or her own sense of fairness to consider whether dismissal as a sanction is appropriate. Other than citing authorities of the defunct Industrial Court and the Labour Court, nowhere does the third respondent evidently discuss and or consider whether insolence justifies a sanction of dismissal. Coupled with this apparent failure is the fact that the third respondent does not deal with the question whether employer and employee relationship was rendered intolerable. In *Dikobe, supra*, the LAC stated that an award bereft of any consideration of the appropriate sanction is in principle wrong. The approach of taking for granted that guilt warrants dismissal is found to be wrong in principle.[25] On the contrary, the evidence of the CFO was that there is a professional working relationship.[26] The CFO's intention, when he called her to his office, where the alleged belittlement of authority happened, was to find out about the incident alleged in the charge and warn her accordingly.[27] This points to the fact that dismissal as a sanction was inappropriate and the employer employee relationship is unaffected by her conduct on 15 February 2012. Despite feeling belittled in authority, the CFO did not insist on a charge of insolence before the second applicant can be charged and arraigned.[28] On the contrary, he sought discipline on the strength of the complaint by Mashi, security manager.[29]

[25] *Dikobe* (*supra*) at para 24.
[26] Transcript paginated page 59 lines14-15.
[27] Transcript paginated page 63 lines 19-22.
[28] The SCA in *Myers, supra,* at para 24 observed that there is also the question of absence of evidence that the relationship between the appellant and the SAPS had broken down to such an extent that continued employment was out of question or no longer possible.
[29] On 15 February 2012, Mashi addressed a complaint to the CFO. The security manager was reporting what Edith Mogodingane averred. He was concerned with security issues and rumour

[21] The above failures points to the fact that the third respondent committed an irregularity and or misconduct which also vitiates his award. An award tainted with irregularities cannot be found to be reasonable. Quiet recently, the LAC in an unreported judgment of *Ethekwini Municipality v Hadebe and Others*,[30] had the following to say about the test:

> '[25] Therefore, the upshot of both *Herholdt* and *Goldfields* is that a process failure on the part of a commissioner does not in itself render an award unreasonable. In order for it to be unreasonable, it has to be established that such failure caused the result of the award to be unreasonable. Thus, a process failure is of no consequences if the final result of the award is, nevertheless, capable of reasonable justification.'

[22] It cannot be said that the award before me is capable of reasonable justification and, accordingly, ought to be reviewed and set aside. I have no issues with a finding of procedural fairness. I did not understand Ngako to be challenging the procedural fairness finding. In my view, the first respondent has failed to justify a dismissal. Even though the applicant chose to label the alleged misconduct as unacceptable behavior, in truth what infuriated the CFO, who subsequently requested disciplinary enquiry is the allegations that his travel claims were suspect and that he does not possess a driver's license. To my mind, the second applicant did not commit any misconduct. Put it differently, she did not contravene a workplace rule. It seem apparent that the management at the time had inherited some culture that is despicable and riddled with lapse of security and rumor mongering. However, in seeking to address that culture, the second applicant was charged with what as I said was no misconduct, hence the first respondent struggled to label it.

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mongering. At paragraph 1.2, the second applicant allegedly stated she was looking for travel documents of the CFO, who did not have a driver's licence and that the travel claims were suspect. When he, the CFO, escalated the complaint to the Municipal Manager, he stated that the allegations were distasteful, preposterous and annoying. Nowhere near belittling of authority to which he testified about at arbitration. He escalated the complaint on 16 February 2016, a day after the second applicant slammed the door and said you can do what you want.

[30] (DA17/14) [2016] ZALAC 14 (10 May 2016) at para 25.

[23] A dismissal not based on a fair reason is substantively unfair. In terms of section 193(2) of the LRA, if a court finds that a dismissal is unfair, the court may order reinstatement of the employee from any date not earlier than the date of dismissal. The exceptions to the remedy of dismissal are spelled out.[31] None presents itself in this matter. In *Dikobe, supra*, the LAC had the following to say with regard to the remedy:

> 'Reinstatement has been sought and must be granted. An argument was advanced to suggest that the lapse of time militates against such an order. That factor alone is of no relevance. In the absence of evidence to demonstrate intolerability or impracticality as contemplated by section 193(2) of the Labour Relations Act 66 of 1995, no lawful reason exists not to order reinstatement. Axiomatically, where an employee is exonerated from misconduct, no factual basis can exist to found an argument that the trust relationship is compromised.'[32]

[24] In *Potgieter v Tubatse Ferrochrome and Others,*[33] the court stated that "impracticability" generally addresses unfairness in terms of operational or similar grounds. In *casu,* there is no evidence that covers this leg. Further, that "intolerability" addresses trust relationship issues between the employer and the employee. Equally, there is no evidence that covers this leg.

[25] In summary, the award is not reasonable, the third respondent having committed the irregularities and misconducts spelled out above. The evidence does not demonstrate breach of any work related rule. The dismissal was not justified.

[26] As to costs, this court has discretion to be exercised with reference to law and fairness. Both parties argued that costs must follow the results. I do not see how this court can be averse to that.

[27] Accordingly, I am of a firm view that the award is reviewable. It does not fall within the bounds of reasonableness.

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[31] Section 193 (2) (a)-(d)
[32] *Dikobe*, *supra*, at para 27.
[33] (2014) 35 *ILJ* 2419 (LAC) at para 37.

Order

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

1. The award issued by the third respondent is hereby reviewed and set aside.

2. The first respondent is ordered to reinstate the second applicant with effect from the date of his dismissal, on 19 November 2012, without loss of any remuneration and related benefits.

3. The first respondent shall pay the costs of this application.

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Moshoana, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Mr X Ngako of Ruth Edmonds Attorneys Inc, Observatory, Johannesburg.
For the First Respondent:	Advocate A Tema
Instructed by:	De Swardt Vogel Myambo Attorneys, Brooklyn Pretoria.