



THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Reportable

Case no: JR2344/2012

In the matter between:

MOHOKARE LOCAL MUNICIPALITY

Applicant

and

KELEBONE JOSEPH MAKHUBE

First Respondent

SOPHY NANCY NZULA

Second Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Third Respondent

ADVOCATE CHARLTON REX N.O.

Fourth Respondent

Heard: 17 February 2016

Delivered: 28 July 2016

JUDGMENT

GOLDEN, AJ

Introduction

- [1] The applicant seeks to review and set aside the arbitration award issued by the fourth respondent (“the commissioner”) on or about 12 September 2012 under case number FSD021001. I shall refer to the applicant as the Municipality and the first and second respondents, who are the employees, collectively as the respondents.
- [2] The first respondent was employed by the Municipality as a Skills Development Officer and the second respondent as a Pay Roll Officer before their dismissal. The respondents were dismissed for dishonesty in that certain fraudulent claims were deposited into their respective bank accounts which they failed to report.
- [3] In and around November 2006, certain financial irregularities were investigated within the Municipality. A full scale forensic investigation was subsequently conducted into the financial affairs of the Municipality by the office of the Auditor General. Various employees were interviewed including the respondents. According to the Municipality, the forensic investigation revealed that the respondents were involved in fraudulent activities, for which they were both subsequently suspended. They were found guilty of misconduct and dismissed after attending a disciplinary hearing. Their dismissal was based on the findings of the forensic investigation, which was contained in a final report issued by the Auditor General (“the report”). The report is attached to the founding affidavit as annexure “B”.
- [4] Attempts at an internal appeal did not yield a different result and the sanction of dismissal was upheld. The respondents then filed an unfair dismissal dispute with the Bargaining Council who arbitrated the dispute. The award, issued by the commissioner, found that the respondents’ dismissal was substantively and procedurally unfair. The commissioner ordered that the first respondent be reinstated and that the second respondent be compensated.
- [5] The Auditor General’s report played a pivotal role in the arbitration. It is not in dispute that the arbitration was postponed on several occasions to afford the Municipality the opportunity to call a witness/s from the Auditor General’s office to confirm the content and findings of the report.

- [6] In his findings, the commissioner concluded that the report, absent any evidence to confirm the contents and findings thereof, amounted to hearsay evidence to which little or no evidentiary value could be attached. The commissioner ultimately concluded that the Municipality failed to discharge the onus upon it, in proving, on a balance of probabilities that the respondents perpetrated the alleged misconduct for which they were dismissed.

The Grounds of Review

- [7] The Municipality relies on two grounds of review. It alleges that the commissioner committed a gross irregularity in the conduct of the arbitration proceedings when he concluded that the report was not admissible. The second ground of review is that the commissioner exceeded his powers as envisaged in section 145(2)(a)(iii) of the Labour Relations Act 66 of 1995 ("the LRA") on the basis that the failure of the commissioner to consider relevant evidence, namely, the report resulted in the award being manifestly unfair. Related to this ground of review is the suitability of reinstatement in favour of the first respondent, which the Municipality contends, was entirely inappropriate given the breakdown in the trust relationship.
- [8] The main ground of review relates to the admissibility of the report. The Municipality contends that this finding is unsustainable for a number of reasons itemised in paragraphs 48.1 to 48.8 of its founding affidavit. I shall address only the most salient points advanced in support of this contention.
- [9] It is apparent that the respondents challenged the findings of the report at the outset of the arbitration insofar as the report suggested that they were complicit in fraud and that they had received a number of irregular payments from the Municipality which they failed to disclose.
- [10] The report records in paragraph 5.1.2(a) that:

‘Several fraudulent transfers via the Electronic Funds Transfer System into the same bank accounts used to pay the salaries of the Procurement Officer, the Skills Development Officer and the Pay Roll Officer of the Municipality were identified. They used invoices, copies of invoices, duplicate subsistence and travelling claims of other employees, temporary workers’ wages and other fraudulent transactions to act as supporting documentation or descriptions for these irregular transfers.’

[11] According to the report, the first respondent (referred to as the Skills Development Officer in the report) voluntarily gave a statement wherein he confirmed that he had made use of four different personal bank accounts to transfer municipal funds to. He also opened a fifth personal bank account during November 2007. The report states that transfers into this account could not be verified. The report records in paragraph 5.1.2(e) that the first respondent made a statement that the Procurement Officer had approached him to make fraudulent transfers to his personal bank account in exchange for information regarding temporary workers. The report notes that the first respondent was not aware of the total amount of fraudulent payments made into his bank account and that none of these amounts were paid over to the Procurement Officer or paid back to the Municipality.

[12] It is recorded in paragraph 5.1.2(f) that the second respondent (referred to as the Pay Roll Officer in the report) voluntarily gave a statement wherein she confirmed that she had made use of two different personal bank accounts to which municipal funds had been transferred. It is further recorded that she had no knowledge of the amounts that were paid into her bank account and that none of these amounts were paid back by her to the Municipality. The report records that the second respondent stated that she never conspired with the Procurement Officer to defraud the Municipality and that she had never made any payments on the electronic funds transfer system.

[13] In paragraph 5.1.4(b) of the report, the following findings were made in relation to the first respondent:

'The Skills Development Officer:

(i) It was found that a total of 173 transfers, totalling R354 142 were made to the three personal bank accounts of the skills development officer during the period 29 May 2003 to 31 October 2007.

(ii) Also included in the above total were his salary payments, totalling R261 561. However, the validity of the salary payments could not be verified, as the salary scales and benefits to which the skills development officer were entitled could not be confirmed from the available documentation received from the human resources division of the Municipality.

(iii) The following is a summary....

- (iv) Furthermore, the electronic funds transfer system's data received from the Municipality's bank indicated that the passwords used to capture and approve the payments made to the three personal bank accounts of the skills development officer were those of the previous financial officer, municipal manager, debtors clerk, accountant: expenditure and procurement officer.'

[14] In paragraph 5.1.4(c), the following findings were made in relation to the second respondent:

'(c) **The Payroll Officer:**

- (i) A total of 71 transfers, totalling R135 650,00 were made to the two personal bank accounts of the payroll officer during the period 24 November 2003 to 31 October 2007.
- (ii) It should, however, be noted that included in the above total were her salary payments, which appear to be R127 820 and substantiated subsistence and travelling claims, totalling R800, for the period under investigation. However, the validity of the salary payments could not be verified, as her salary scales and benefits could not be confirmed from the available documentation received from the human resources division of the Municipality.
- (iii) The following is a summary of the electronic funds transfer...
- (iv) Furthermore, the electronic funds transfer system's data received from the Municipality's bank indicated that the passwords used to capture and approve the payments made to the three personal bank accounts of the payroll officer were those of the municipal manager, accountant: expenditure, previous financial officer and procurement officer.'

[15] The charges levelled against the first respondent were the following:

'2.7.5 Any act of gross dishonesty

In that since November 2003 and till October 2007, 173 transfers were done into your bank account number 2818152291 ABSA, 406200711 ABSA and 62065732870 FNB. These transfers amounted to R354 142.93 and this includes your salary package. These fraudulent claims are attached as Annexure "A" page 1 to page 5.

The misconduct on your part is that you failed to report these deposits in your account to the Municipality. This is viewed as an act of being dishonest. You also colluded with a certain Mr Leanya about these transfers. The Council has suffered a loss in this process.'

[16] The charges levelled against the second respondent were the following:

'2.7.5 Any act of gross dishonesty

In that since November 2003 until October 2007, 71 transfers were (sic) deposited into your account number 4063624314 ABSA, 9098820211 ABSA. These transfers amounted to R135 650.00 and this includes your salary package. These fraudulent claims are attached as Annexure "A" page 1 to page 2. The misconduct on your part is that you failed to report these deposits in your account to the Municipality. This is viewed as an act of being dishonest. The Council has suffered a loss in this process.'

[17] The nature of the charges was that the payments which were made into the bank accounts of the respondents were "fraudulent claims" and that it amounted to misconduct when the respondents failed to report the deposits. The charges were serious and if proved, would ordinarily warrant dismissal.

[18] As previously stated, the respondents, at the outset, disputed the findings of the report insofar as the findings suggested and/or concluded that they were guilty of submitting fraudulent claims and that they were dishonest when they failed to report these irregular payments to the Municipality.

[19] I deal first with the admissibility of the Auditor General's report. Without direct evidence to verify its contents and findings, the report amounted to hearsay evidence. The applicant contends that the commissioner's finding that the report amounted to inadmissible hearsay was impermissibly legalistic and that it overlooked the injunction that arbitrators must deal with the substantial merits of the dispute with the minimum of legal formalities. It contends that such a finding is not one that a reasonable decision-maker could have reached.

[20] The applicant misconceives the legal position with regard to hearsay evidence and the admissibility of the report.

- [21] The definition of hearsay is set out in section 3(4) of the Law of Evidence Amendment Act 45 of 1988 (“the Law of Evidence Amendment Act”) as “evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence”.
- [22] It is trite that documents are generally deemed to be hearsay evidence until such time as it has been proven that they are what they purport to be.¹ A Court, in its discretion, may permit such evidence in terms of the Act.²
- [23] The common law rules regarding the admission of hearsay evidence were rendered more flexible by the coming into operation of the Law of Evidence Amendment Act.
- [24] The Act does not propose an absolute rule that hearsay evidence is inadmissible. In considering hearsay evidence, the Court will have regard to factors such as the nature and purpose of the evidence, the probative value and reliability, the reason why direct evidence was not submitted, the possible prejudice to the other party and all the other facts of the case. These are, *inter alia*, the factors which, according to section 3 of the Act, a Court should take into account.
- [25] However in *Makhatini v Road Accident Fund*,³ the Supreme Court of Appeal makes it clear that the admission of hearsay evidence is not a mere formality and that the admission of the evidence is not to be had merely for the asking.
- [26] If these considerations and principles are applied to the present case, I find no fault in the commissioner’s finding that the Auditor General’s report was inadmissible on the basis that it was hearsay. My view is also informed by the following. Firstly, the charges levelled against the respondents were serious and implicated them in fraudulent activity and dishonesty. Their dismissal was based solely on the findings in the Auditor General’s report. The other witnesses who testified on behalf of the Municipality had no insight into the report and could not testify directly to the findings contained therein as they were not directly involved in the investigation.
- [27] The Municipality was afforded an opportunity to obtain a suitable witness from the Auditor General’s office to testify to the report and to confirm the findings therein. No

¹ *Concorde Plastics (Pty) Ltd v NUMSA and Others* [1998] 2 BLLR 107 (LAC).

² See *Wright v Wright and Another* 2015 (1) SA 262 (SCA) at para 15.

³ 2002 (1) SA 511 (SCA) at para 24.

cogent reason was provided by the Department in the course of the arbitration why such a witness could not be secured. The probative value of the report, as a result, was diminished. The respondents were also not able to test the veracity of the findings. The admission of the report into evidence and its probative value, in its hearsay form, had thus to be weighed against the prejudice that the respondents may suffer given the seriousness of the charges.

- [28] I agree with the commissioner's reasoning in paragraph 62 of the award that the Municipality had failed, to the detriment of its own case, to secure permission from the Auditor General and to have relevant witnesses from the Auditor General's office give evidence in support of the findings. By not being able to lead direct evidence of the findings in the report, the Municipality took the risk that the respondents' version would go unchallenged.
- [29] No explanation was provided by the Municipality as to why the relevant witnesses could not have been subpoenaed. In my view, this effort was necessary, given the seriousness of the charges and the fact that the respondents pertinently disputed the findings therein insofar as the findings may have implicated them in fraudulent and/or dishonest conduct. A good reason must exist as to why a suitable witness who can testify directly to the findings in the report could not be secured. No good reason was provided.
- [30] In the premises, there was no basis for the commissioner to invoke any of the exceptions in the Law of Evidence Amendment Act to permit the admission of the Auditor General's report as hearsay evidence. There was no valid ground for any of the exceptions to apply.
- [31] Whilst section 138(1) of the LRA requires that an arbitrator must deal with a dispute with the minimum of legal formalities, it must be remembered that section 3(1)(c) requires the commissioner to consider the nature of the proceedings when making a ruling on the admission of hearsay evidence.⁴

⁴ *Mosima v SA Police Service and Others* (2012) 33 ILJ 1225 (LC) at para 28; *POPCRU obo Maseko v Correctional Services and Others* [2011] 2 BLLR 188 (LC).

- [32] In my view, the admission of the report as hearsay would clearly have prejudiced the respondents. I, accordingly, do not agree that this finding of the commissioner was impermissibly legalistic.
- [33] The commissioner concluded that the inadmissibility of the Auditor General's report resulted in the failure by the Municipality to discharge the onus upon it to prove on a balance of probabilities that the dismissal of the respondents was substantively and procedurally fair. This conclusion, correct as it was, was not only based on the finding that the Municipality had not obtained permission from the Auditor General to use the report in the arbitration but was also based on the finding that the report amounted to inadmissible hearsay. The contention that the respondents' challenge was not directed at the admissibility of the report itself but in the reliability of the findings contained therein is, with respect, a fictitious distinction. The real issue is whether the findings in the report amounted to hearsay evidence and whether, if it did, it fell to be admitted into evidence.
- [34] The failure on the part of the Municipality to discharge its onus was also attributed to the fact that the witnesses who testified on its behalf could not confirm the findings in the report. I refer in this regard to paragraphs 69 to 73 of the award. Since the commissioner pertinently applied his mind to the evidence of the Municipality's other witnesses, I do not agree that he only confined his enquiry to the admissibility of the report. The onus was on the Municipality to prove that the respondents were fairly dismissed. To this end, a consideration of the evidence of the Municipality's other witnesses was entirely appropriate.
- [35] Ultimately, the Municipality failed to discharge the onus to prove that the respondents were fairly dismissed.
- [36] Although the findings in the report do give rise to concern, it cannot legitimately be argued that the version of the respondents' was sufficient, on the probabilities, to discharge the onus resting on the municipality, or that it corroborated the findings in the report. Although the respondents admitted that they received deposits into their accounts, they disputed that the deposits came from the Municipality. The second respondent testified that she asked the municipality for proof that the payments came from the municipality, which was never forthcoming. Her evidence was left entirely

unchallenged. The contention made and the evidence itemised in paragraphs 54.1 to 54.6 of the founding affidavit accordingly does not assist the Municipality in its case.

- [37] I can find no reason to interfere with the commissioner's conclusion that the Auditor General's report was inadmissible hearsay evidence.
- [38] I find no reason to interfere with the commissioner's finding that the Municipality had failed to discharge the onus upon it to prove, on a balance of probabilities, that the respondents were fairly dismissed. The commissioner's approach to the matter and his findings in this regard was reasonable. This ground of review must accordingly fail.
- [39] The findings in the report would in any event not be without challenge. Paragraph 4.3 of the report states that 'although the work performed incorporates our understanding of the law as it stands, we do not express a legal opinion on the issues or the guilt or innocence of any person(s) or party, but merely state the facts as they came to our attention'. Paragraph 4.4 states that 'the report serves as a discussion document and may not be used for any other purpose without the consent of the AG and that in the case of civil litigation, criminal litigation and disciplinary hearings, the document may only be used as a background document'. This, in itself, places the status of the document in dispute and, in my view, also places a heavier burden on the Municipality to verify the findings through direct evidence.
- [40] According to the report, the fraudulent transfers were made by the procurement officer (who is not a party to the review application), as he had the passwords of the first and second approvers (the municipal manager, accountant: expenditure and previous financial officer) that were needed to complete the transfers. The report records that the passwords were supplied to the procurement officer by the previous chief financial officer and that the municipal manager and acting chief financial officer were both aware of the fact that the procurement officer had all three passwords to make transfers via the electronic funds transfer system, as they had requested him on several occasions to make payments to suppliers when they were not available. Although certain transfers were identified in respect of the respondents, the validity of the transfers could not be verified as the transfers included salary payments and benefits. The same applied in respect of the second respondent. The report also appears to accept that "any other valid payments" were also made into the bank accounts of the first respondent. It is unclear what these "other valid payments" are. In

respect of the second respondent, it was recorded that she was paid 'substantiated subsistence and travelling claims' and that 'any other valid payments' were also made into her bank accounts. Without making a finding to this effect or without expressing a firm view on the issue, it does appear that the findings in the report are problematic.

- [41] The second ground of review rests on the basis that the commissioner exceeded his powers as envisaged in section 145(2)(a)(iii) of the LRA. The Municipality contends that the arbitration award is manifestly unfair given that the commissioner refused and/or neglected to consider relevant evidence, namely, the Auditor General's report. I do not agree with this contention given my finding regarding the inadmissibility of the report.
- [42] In further support of this ground of review, the Municipality contends that the remedy of reinstatement in favour of the first respondent was inappropriate given the breakdown in the trust relationship. The basis for this contention is the allegation that the respondents bribed the chairperson of the disciplinary enquiry when they offered her an amount of R5 000 for a favourable outcome.
- [43] There was no evidence on record that the respondents attempted to bribe or that they bribed the chairperson of the internal disciplinary hearing. They disclosed that the chairperson approached them after the hearing and offered to assist them with closing written arguments for payment of an amount of R5 000. This would, needless to state, be improper conduct not only on the part of a chairperson but also the respondents for accepting the offer.
- [44] The matter was heard *de novo* before the Bargaining Council, where the parties received a fair hearing.
- [45] I am of the view that the respondents' conduct, although dubious, should not be held against them in the determination of a suitable remedy. There were, in any event, other options open to the Municipality to address the bribery complaint.
- [46] Since the Municipality failed to discharge its onus, on a balance of probabilities, that the respondents' dismissal was substantively and procedurally fair, I can see no reason why the first respondent should not be reinstated if that is his choice. Similarly, I do not find it inappropriate to have awarded the second respondent compensation, if

compensation is her choice. The arbitration award in this regard is entirely reasonable.

[47] There is, accordingly, no merit in this ground of review.

Conclusion

[48] In the premises, I find that the findings in the arbitration award were reasonable as contemplated in the test formulated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.⁵

[49] The application for review is, accordingly, dismissed. There is no reason why costs should not follow the result.

Golden, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate PH Kirstein

Instructed by: Ndumiso Voyi Incorporated

For the Respondent: Advocate J Nortje

Instructed by: Kramer Weihmann & Joubert

⁵ (2007) 28 ILJ 2405 (CC) at para 110.