IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGEMENT

Reportable

Case no: JR 2826/11

In the matter between:

CENTRAL UNVIVERISTY OF TECHNOLOGY **Applicant**

And

S KHOLOANE **First Respondent**

MARINA TERBLANCHE *N.O* **Second Respondent**

CCMA FREE STATE **Third Respondent**

Heard: **8 September 2016**

Delivered: **23 September 2016**

Summary: Changing the decision of the chairperson-provisions in disciplinary code/ procedure no licence for unreasonable changes-review application dismissed

JUDGEMENT

MATYOLO AJ.

INTRODUCTION

1 The employee was charged with allegations of fraudulent / dishonest conduct in relation to misappropriation and or unlawful possession of the Applicant's property. The employee was found guilty in a properly constituted disciplinary enquiry and a sanction of final written warning valid for six months was issued against him.

2 The Applicant, employer, later changed the sanction and imposed one in which the employee was dismissed. The employee referred an unfair dismissal dispute with the Commission for Conciliation Mediation and Arbitration. The dispute could not be resolved at Conciliation. The arbitrator, Commissioner Marina Terblanche found that the dismissal was substantively and procedurally unfair.

3 The two allegations of misconduct with which the employee was charged were couched in the following terms:

3.1 Fraudulent / Dishonest conduct in that: On or about 20 June 2009 whilst officially on day shift at CUT Campus, you left the workplace before 14h00 without permission, to perform external work for the SPE Security Firm.

3.2 Misappropriation / Unlawful possession of CUT property in that: On 22 March 2009 you used a CUT Nissan vehicle with registration numbers 014 TFS FS while off duty.

4 On 9 May 2011, a letter was dispatched to the employee informing him of the outcome of the disciplinary enquiry and an indication that the matter had been concluded. The last paragraph of this letter reads as follows: *"After careful consideration of all the circumstances, the following sanction has been recommended and approved in terms of the Disciplinary Rules of the Central University of Technology, Free State as well as my delegated authority:* ***Final Written, valid for six (6) months."***

5 On the 11 May 2011,the employee was issued with a document headlined," ***Approval of Recommendation After A Disciplinary Hearing: Mr S Khoalane (1183)*** approving the recommendation made by the Presiding Officer/ Chairperson that the employee is issued with a final written warning valid for six months with immediate effect. The Executive in Charge of Protection Services, Professor M.E Ralekhetho, issued the approval.

6 It however appears that on the 23 May 2011 the employer, the Applicant herein, had a change of heart as both the letter of the 9 May 2011 and the approval of the 11 May 2011 were crossed out. The following words appear in between the lines crossing the letter out: "*revoked: Recommend immediate dismissal"*.

7 A letter was then written to the employee on 30 May 2015 informing him of the Applicant's changed decision on the basis that the Applicant does not believe that the recommended sanction is proportional with the nature and seriousness of the misconduct for which the employee was found guilty. The letter concludes by informing the employee that a decision has been made to terminate his employment with immediate effect and advises him to return all company property in his possession and that he could take the decision to the CCMA in 30 days if he so wished.

8 The employee indeed referred an unfair dismissal dispute to the CCMA and the CCMA issued the award that is the subject of this review application.

The Evidence

9 The alleged acts of misconduct took place in March and June 2009 and the employee was only charged in 2010. He continued with his work during this period with the Applicant until the revocation of the Final written warning on the 23 May 2011, almost two years after the incident complained about.

10 Professor Ralekhetho, the only witness for the Applicant testified that, " *In the spirit of corrective counselling I imposed a final written warning valid for 6 months as a sanction befitting Mr S Khoalane finally."*

11 Under cross-examination Mr Ralekhetho was asked: Did you read the contents of this document before you signed it? He answered: Oh I thought you said did I write it. I wrote it. Certainly I did.

12 Professor Ralekhetho testified that having come to his conclusion that the final written warning that is valid for 6 months was appropriate in the sprit of corrective counselling, he then went back and had a discussion with one Mofejane who had early advised them on the charges and changed his views about the appropriate sanction. He did not have any discussion with the chairperson of the enquiry about the review or changes he now wanted to effect.

13 Lastly on the evidence, Professor Ralekhetho testified that the Applicant has no code of conduct or procedure on how to review decisions but was only relying on what he referred to as management practice.

The Award

14 The arbitrator found the dismissal to be procedurally and substantively unfair.

15 In coming to this conclusion it appears that the arbitrator took into consideration the fact that the regulatory code of the applicant lists a number of sanctions that are available to the employer for infractions such as the one the employee herein was charged with. The list includes dismissal and other alternative sanctions and a final written warning as one of the appropriate sanctions.

16 The arbitrator also looked at the fact that the infractions complained about occurred in 2009 and the disciplinary enquiry started in 2010 and the employee was only taken out of the premises effective from the 23 May 2011, a period of more than a year after the infractions complained about it were committed. She also notes that during this period the employee continued working in the same capacity with the same amount of responsibilities and no incidents were reported.

17 The arbitrator found that the applicant had indicated through its actions that there was no breakdown in the trust relationship and in the light of the evidence concluded that the dismissal of the applicant was not an appropriate sanction. On procedural fairness the arbitrator found that no opportunity was given to the employee to make representations on the changes that led to the immediate dismissal of the employee.

18 The arbitrator also looked at the fact that the chairperson who had listened to the evidence was not involved in the changes to the sanctions but the person who had advised on the charges was the one who now advised on what was the" new appropriate sanction".

Grounds of Review

19 It was submitted on behalf of the applicant that the only thing for determination by the arbitrator was whether it was fair for the employer to unilaterally change the sanction to that of dismissal and in finding as she did, so the argument went, the arbitrator exceeded

her mandate and conflated the issues and came to an irrational finding on the evidence.

20 It was submitted further that the finding that the dismissal was not an appropriate sanction was irrational and shows that the arbitrator exceeded her powers that were limited to the determination of the applicant's power to change the sanction.

21 The applicant submitted further that the Commissioner committed an irregularity in finding that the applicant acted unfairly in not allowing the employee an opportunity to make representations on the basis that the employee had been given all his procedural rights at the enquiry and there was no need to have him make representations when the decision was being changed.

Evaluation/ Analysis

22 The applicant essentially takes issue with what it understood as the issue that the arbitrator was required to decide. The applicant seems to understand that the only issue the arbitrator was to deal with was whether the applicant was empowered to change the decision of final written warning to a dismissal. Their main submission is that the arbitrator was not required to decide anything else and in making findings on the unfairness of the dismissal, so the argument went, the arbitrator exceeded her mandate.

23 This is a narrow way of looking at what the arbitrator was required to determine. The proper understanding is that the arbitrator was

required to look at whether the dismissal of the employee as a result of the changes to the sanction was fair. The arbitrator applied a two stage approach to the issues first looking at whether the applicant could change the decision and found that it could and secondly he looked at whether the dismissal on the basis of those changes was fair and found it to be unfair.

24 That is not an unreasonable conclusion if regard is had to the evidence before the arbitrator. The applicant seems to be of the view that the arbitrator had to decide only the question of whether the applicant could lawfully change the decision in a vacuum and without considering the facts of this case. That would have been unreasonable.

25 Secondly the commissioner had to deal with the effect of the changes that were made and the manner in which they were made and decide whether the applicant acted fairly. In changing the decision the employee was dismissed and remained dismissed and in deciding on the powers to change the decision the arbitrator had to deal with the fact that the change led to a dismissal and she therefore had to deal with the procedural and substantive fairness of the dismissal that was brought about by the change in the outcome of the disciplinary enquiry. As indicated earlier the arbitrator found that the dismissal was unfair.

26 In coming to that decision the arbitrator took the following into account:

26.1 The fact that it was common cause that the sanction of final written warning valid for six months was one of the sanctions that are listed as alternatives to dismissal for the infractions with which the employee was charged. The final written warning could therefore not be viewed as "shockingly" disproportionate.

26.2 The fact that in coming to the sanction the chairperson is required to deliberate with vice chancellor. That did not happen herein, instead the vice chancellor went and deliberated on the changes to the sanction with one Mafojane who had advised him on laying the charges completely ignoring the chairperson, who heard the evidence and without giving an opportunity to the employee to make representations. This is not unreasonable.

27 In *Fidelity Cash Management Services v CCMA & Others*[1] the Labour Appeal Court per Zondo JP held *inter alia* that: " *Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner*..." The evidence before the arbitrator herein was that the original sanction is one of the listed alternatives to dismissal. There was no proper

[1] [2008] 3 BLLR197 (LAC) at para 103

explanation for the changes and no proper process was followed in effecting the changes.

28 In *Gold Fields Mining South Africa (Pty) Ltd (Kloof gold mine) v CCMA & Others*[2] the Labour Appeal Court held inter alia that: *" the reviewing Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of those factors amounts to a process-related irregularity sufficient to set aside the award…*" It is clear therefrom that this Court sitting as a review Court is enjoined not to engage in an aggregation exercise but to evaluate whether the award of the commissioner is reasonable when regard is had to the totality of the evidence before him or her.

29 In *Kievits Kroon Country Estate (Pty) v Mmoledi & Others*[3], it was held *inter alia* that an applicant in a review application must demonstrate that both the commissioner's reasons and the result of the award are unreasonable and that if the reasons are unassailable that then brings an end to the matter. The arbitrator's reasons herein are that in terms of the employer's own regulatory framework the sanction of written warning was provided for as alternative to dismissal and there was therefore no basis for changing that sanction to dismissal. The fact that no fair process was following in changing the outcome makes the dismissal procedurally unfair.

[2] [2014] 1 BLLR 20 (LAC) at Para 17-18
[3] [2012] 11 BLLR 1099(LAC)

Consequently the arbitrator found the dismissal of the employee to have been procedurally and substantively unfair.

30 The Constitutional court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4] *held inter alia that*, In deciding how commissioners should approach the task of determining the fairness of a dismissal, it is important to bear in mind that security of employment is a core value of the Constitution which has been given effect to by the LRA.[5] This is a protection afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterises employment in modern developing economies.[6] is inherent and must be inherent in the employment relationship."[7]

31 The Constitutional Court held further that, the Constitution and the LRA seek to redress the power imbalance between employees and employers. The rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organisations. Neither the Constitution nor the LRA affords any preferential status to the employer's view on the

[4] [2007] 12 BLLR 1097

[5] In this regard see *NEHAWU* above n 48 at para 42.

[6] Cheadle et al above n 52 at 18-5.

[7] Davies and Freedland *Kahn-Freund's Labour and the Law* 3 ed (Stevens & Sons, London 1983) at 18 quoted in Cheadle et al above n 52 at 18-5.

fairness of a dismissal. It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to a dispute. Dismissal disputes are often emotionally charged. It is therefore all the more important that a scrupulous even-handedness be maintained.

Conclusion.

32 It is on this basis that I hold a view that, Clauses in disciplinary procedures and or codes that allow for senior management to make changes to sanctions cannot be understood to give unfettered discretion to management but must be understood to be tools to correct sanctions in circumstances where the sanctions of the chairpersons are wholly or shockingly inappropriate. It is unlikely that a sanction that is listed as an alternative could be viewed as such. In the premises there was no basis in fact and in law for the changes to the sanction herein.

33 In the premises I find that the arbitrator's award herein passes the test as postulated in Sidumo and in Gold Fields.

Order

34 Accordingly, I make the following order:

34.1 The review application is dismissed with costs.

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MATYOLO X.D

Acting Judge of the Labour Court

Appearances:

For the Applicant	:L Companie
Instructed by	: Henney Phatshoaneninc
For the Respondent	: Mohale Magoshi
Instructed by	: Majang inc