REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, BRAAMFONTEIN

JUDGMENT

Case no: JR 452/15

In the matter between:

ALS CHEMEX SOUTH AFRICA (PTY) LTD	Applicant
and	
Safeeullah KHAN	First Respondent
Tebogo Shadwick MAFUJANE N.O.	Second Respondent
CCMA	Third Respondent

Heard: 13 October 2016

Delivered: 2 November 2016

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, ALS Chemex (Pty) Ltd, dismissed the first respondent, Mr Safeeullah (Shafee) Khan, for misconduct. He was alleged to have committed an act of gross dishonesty by failing to report unauthorised withdrawals by a fellow employee; and "aiding an employee in the fraudulent activity of unauthorized withdrawals of company petty cash by allowing the employee time to reimburse" the money. Mr Khan is an accountant.

[2] The employee referred an unfair dismissal dispute to the CCMA (the third respondent). Conciliation was unsuccessful. It came before the second respondent, commissioner Mafujane, at arbitration. He found that the dismissal was unfair and ordered the company to reinstate the employee. The company seeks to have the award reviewed and set aside in terms of s 145 of the LRA.[1]

Background facts

[3] Khan was on leave on Thursday 17 and Friday 18 July 2914. In his absence, a debtor's clerk, Ms Janice van Schalkwyk, asked Ms Christine Evans for R1 371, 40 from petty cash. Evans gave it to her, apparently on false pretences by Van Schalkwyk. The next day, Van Schalkwyk asked for another R3000 from petty cash, telling Evans that Khan had approved it telephonically. That was a lie. Evans paid it out based on the misrepresentation.

[4] Upon his return to work on Monday 21 July 2014, Khan learnt of the unauthorised withdrawals when Evans asked him for written approval. He told Evans that he had not granted such approval. That same morning at 09:25 Evans sent Van Schalkwyk and Khan an email stating:

> "I have spoken to Shafee and he says he never authorised anything, and that you never phoned him yesterday [*sic*] regarding monies [*sic*] loaned.

[1] Labour Relations Act 66 of 1995.

> Please, considering the circumstances, and my belief that everything had been authorised by Shafee, could you sort this out ASAP and pay back the monies borrowed without authorisation."

[5] Khan also sent an email to Van Schalkwyk and Evans at 09:38 stating:

> "I did not authorise any monies to be paid out by Christine to you, therefore please return the R3000 ASAP."

[6] Van Schalkwyk replied and promised to return the money the same day. At 16:51 she sent a further email to Khan and Evans:

> "Just to keep you informed, I have not forgotten about my promise to return the money. The person that needs to bring the funds is stuck. I assume traffic, but said he will try his best to get it to me ASAP.
>
> They [*sic*] I ask for grace until tomorrow."

[7] The next day, Tuesday 22 July, Khan mentioned to Ms Louise Gronland, the regional HR manager, that employees were taking money out of petty cash. When she asked for further details, Khan told her that Van Schalkwyk had been given R3000 out of petty cash under false pretences. Gronland informed Khan's line manager, Mr Ranga Mabgwe.

[8] Khan was called to a disciplinary hearing and dismissed for:

8.1 failing to report the unauthorised withdrawals and fraudulent activity to his line manager, Mabgwe, as soon as he became aware of it;

8.2 aiding an employee (Van Schalkwyk) in the fraudulent activity of unauthorised withdrawals of company petty cash by allowing the employee time to reimburse the money; and

8.3 failing to declare the specific detail of this fraudulent activity to Mabgwe when he discussed the matter with him on 22 July 2014.

[9] An internal appeal was unsuccessful and Khan referred an unfair dismissal dispute to the CCMA. Conciliation failed and it was referred to arbitration before the second respondent, Commissioner Mafujane.

The arbitration award

[10] At the arbitration, Khan was represented by his attorney, Mr Tasso Anestides of Schindlers Inc. ALS was not legally represented. Its HR Coordinator, Mr Jan Kelderman, represented it.

[11] The arbitrator considered the evidence of Mabgwe and Khan. At the end of Mabgwe's evidence, Kelderman asked to give evidence on the procedural and substantive fairness aspects of the disciplinary hearing. The arbitrator refused. He said in his award:

> "He [Kelderman] should have given his testimony as the first witness of the [employer]. He had indicated that he intended to call only one witness to testify. The second point is that he cannot testify on the procedure and substantive fairness in that he was not the chairperson of the disciplinary hearing. He was an observer in the hearing. He was reminded that more than once he was afforded an opportunity to apply to have the arbitration postponed, so that he can acquire legal representation. He declined the offer."

[12] The arbitrator found that Khan had not committed gross misconduct:

> "The charges levelled against [*sic*] are in no way gross as the [employer] deems them to be. The amount involved is R3000, 00 and it is difficult as to [*sic*] determine how the alleged dishonesty is defined as gross. Dishonesty is lack of honesty or integrity or a disposition to defraud or deceive or a dishonest act. None of the aforementioned factors apply [*sic*] in this case. There is no evidence that the [employee] acted dishonestly or defrauded the [employer]."

[13] The arbitrator also found that the dismissal was substantively unfair because Van Schalkwyk had not been dismissed. "This was not challenged by the [employer]."

[14] With regard to procedural fairness the arbitrator said:

> "The [employer] failed to bring the chairperson of the disciplinary hearing to testify that the procedure was fair. The chairperson is accused of being biased and conflicted. The assumption of the [employee] is that the same chairperson chaired Ms Evans [*sic*] hearing before his. The testimony of the [employee] was not challenged and I am bound to accept it as a true version of what transpired and that the procedure was unfair."

[15] The arbitrator concluded that the dismissal was substantively and procedurally unfair. He held that Khan had been employed by ALS for 16 years as he had been retrenched in July 2012 and reemployed in October 2012. He ordered ALS to pay Khan compensation of R 278 779, 30, equivalent to ten months' remuneration.

Grounds of review

[16] The applicant, ALS, raises the following grounds of review:

16.1 The commissioner committed misconduct or a gross irregularity in that he failed to take into account relevant factors or failed to properly apply his mind to the question whether he should have granted the company legal representation.

16.2 The commissioner committed misconduct or a gross irregularity by making adverse findings with regard to Mabgwe's evidence solely on the basis that there was no supporting documentary evidence.

16.3 The commissioner committed misconduct or a gross irregularity by not allowing Jan Kelderman to testify; and

16.4 The commissioner committed misconduct or a gross irregularity by misconstruing an issue of fact and a legal conclusion.

Evaluation

[17] At the hearing of the review application, Mr Fritz *Malan*, for ALS, argued the third ground of appeal first: that is, that the commissioner's refusal to allow Mr Kelderman to testify was a gross procedural irregularity that tainted his conclusion.

[18] It is so that the conclusion with regard to procedural fairness, as well as elements of substantive fairness, was largely based on the absence of any evidence from ALS on the disciplinary proceedings.

[19] This is the very issue on which Kelderman – who was an observer in the disciplinary hearing – wished to testify. Yet the arbitrator refused. He did so because Kelderman had initially indicated that he would call only one

witness (Mabgwe); and that, if he wanted to testify, Kelderman "should have started first".

[20] The arbitrator's refusal should be seen against the background where Kelderman was clearly out of his depth. It is so that the arbitrator gave him the opportunity to postpone in order to get legal representation; but the fact remains that he continued without legal representation. It is only at the end of Mabgwe's evidence that Kelderman clearly saw the need for testimony about the disciplinary hearing. When he sought to lead that evidence, the arbitrator refused, merely because he had not done so first and because he had indicated at the outset that he only intended to call one witness.

[21] An informal indication by a legal representative that she foresaw calling only one witness in legal proceedings could never be a fair reason for a court to refuse the calling of further witnesses; much less so for an arbitrator in informal arbitration proceedings dealing with a lay representative. Yet the commissioner in this case abruptly told Kelderman:

> "So you can't give testimony. You can't give testimony because you said you only had one witness."

[22] Having refused Kelderman's testimony, the arbitrator then bases a large part of his award on the absence of any evidence regarding the disciplinary hearing – the very evidence that Kelderman would have led. That is a reviewable procedural irregularity that deprived the applicant of a fair hearing.

[23] Even should the arbitrator have formed the view that Kelderman should not have testified after Mabgwe, that is not a fair reason for disallowing his testimony either. Firstly, Kelderman would have testified about an entirely different aspect of the company's case; and secondly, there is no such rule applicable to arbitration proceedings. In this regard Mr *Malan* usefully referred to *C/K Alliance (Pty) Ltd t/a Greenland v Mosala NO*:[2]

> "As a general rule, witnesses are normally required to wait outside the court until such time when they would have presented their evidence. The reason

[2] (2009) 30 *ILJ* 571 (LC).

> for this is to guard against the version of a witness being influenced by what they may have heard whilst sitting in during the testimony of other witnesses. This rule is generally not as firmly enforced in arbitration proceedings, and correctly so, as is the case in the courts. This being the case, it seems to me that the appropriate approach is that commissioners are duty bound to warn potential witnesses or those that may have already been identified as such of the possible consequences of their presence during the testimony of other witnesses. But where, for any reason, it turns out later that a witness sat in during the testimony of other witnesses, that should not disqualify such a person from testifying. At best, what the commissioner should do in such a situation is to allow the witness to testify and then evaluate at the end of the proceedings when assessing his or her testimony as to whether his or her version may have been influenced by the version of the other witnesses who testified while present in the hearing."

Conclusion

[24] Given the reviewable irregularity on this ground, the matter should be remitted to the CCMA for another commissioner to hear evidence about the fairness of the disciplinary hearing.

[25] My finding in that regard has the result that I need not consider the other grounds of review. But in any event, another arbitrator will be best placed to decide on the question of legal representation afresh; and he or she will also be able to hear evidence about the rule that Mabgwe testified about, but in respect of which he did not submit documentary evidence.

[26] With regard to costs, I take into account that the matter is not finalised. In law and fairness, I do not consider a costs order to be appropriate.

Order

The arbitration award under case number GAJB 20830-14 is reviewed and set aside.

The dispute is remitted to the CCMA for a fresh arbitration before a commissioner other than the second respondent.

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A J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Fritz Malan of Edward Nathan Sonnenbergs.
FIRST RESPONDENT:	C J Malan
	Instructed by Schindlers attorneys.