



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no. DA09/2015

In the matter between:

UNIVERSITY OF KWAZULU-NATAL

Appellant

and

PRUSHOTHMAN SUBRAMONEY PILLAY

First Respondent

HILDA GROBLER N.O.

Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Third Respondent

Heard: 28 August 2018

Delivered: 25 September 2018

Summary: Review of arbitration award – procedural fairness - Employee dismissed for misconduct by lying under oath – Employer setting a tribunal to investigate the employee’s improprieties – the tribunal recommended that the employee be dismissed for lying under oath – subsequent to the recommendation of the tribunal, the employer instituted a disciplinary hearing to deal with the appropriate sanction which tribunal found that the trust relationship had broken down and also recommended dismissal – Labour Court found that dismissal substantively fair but remitted the matter for the determination on the procedural fairness of the dismissal – commissioner finding that dismissal procedurally fair – Labour Court setting aside award on review – held that

Commissioner's finding is correct and certainly one that a reasonable commissioner could arrive at on the material before her. The lies Pillay told at the Magid Tribunal quite evidently destroyed trust and once the lie was admitted Pillay's defence was primarily aimed at mitigation of sanction to show that notwithstanding his admitted dishonesty he had a good track record, long service and should be forgiven. That was the tenor of the case Pillay presented to Pretorius SC. In the premises, no purpose would have been served by having two separate hearings, one on guilt and the other on mitigation of sanction

Further that The Labour Court made no finding whether the commissioner's finding was unreasonable. The learned judge did not provide reasons for why she considered the award so flawed that the decision of the commissioner was one to which no reasonable commissioner could have come on the material before her. In fact, she did not deal with the finding by the commissioner that a separate hearing on mitigation was unnecessary having regard to the nature of the proceedings and the manner in which the defence was presented. She accordingly erred by failing to address the primary issue on review. The central question of the reasonableness of the award was not asked or answered in her judgment. Labour Court's Judgment set aside and Appeal upheld with costs.

Coram: Davis JA, Hlophe and Murphy AJJA

JUDGMENT

MURPHY AJA

[1] The appellant, the University of Kwa-Zulu Natal ("UKZN"), appeals with the leave of this Court against the judgment of the Labour Court (Fourie AJ) setting aside the award of the second respondent ("the commissioner") and directing payment to the first respondent ("Pillay") of 10 times his monthly salary as compensation for his alleged procedurally unfair dismissal.

[2] Prior to his dismissal, Pillay was employed as Chief Financial Officer at UKZN. On 31 August 2007, the Chair of the Council of the university informed

Pillay that he had been dismissed pursuant to a council resolution approving and accepting a report into his conduct by a disciplinary enquiry chaired by Advocate Paul Pretorius SC (“Pretorius SC”) which recommended his dismissal. Pillay was legally represented (first by senior counsel and later by an attorney) during the proceedings of the disciplinary enquiry. Pretorius SC found that Pillay had lied under oath to a university tribunal chaired by retired Judge Magid and that the dishonesty in question (discussed more fully below) justified dismissal as it had caused an irretrievable breakdown of the employment relationship.

- [3] Pillay challenged the fairness of his dismissal in a referral to the Commission for Conciliation Mediation and Arbitration (CCMA), essentially alleging that dismissal was too harsh and thus an inappropriate sanction. The commissioner found that the dismissal was fair. Pillay then took the award on review. The Labour Court (per Van Niekerk J) held that the dismissal was substantively fair. The learned judge, however, was not satisfied that the commissioner had dealt properly with the question of procedural fairness. He accordingly remitted the matter back to the commissioner to determine whether the dismissal was procedurally fair. In a second amplified award, the commissioner found that the dismissal was indeed procedurally fair. This second award was set aside on review in the Labour Court by Fouche AJ and is the subject of the present appeal.

Background

- [4] The background facts are for the most part common cause. The dispute involving Pillay has its provenance in the award to him of the degree of Master of Commerce by UKZN in 2006. Shortly after the degree was conferred, the university vice-chancellor received anonymous information alleging serious irregularity in relation to the awarding of the degree to Pillay.
- [5] A committee (“the Bawa committee”) under the chairmanship of Professor Bawa was then established and tasked with investigating the allegations. The Bawa committee was concerned with the manner in which Pillay’s dissertation

was marked and passed and the way in which he came to be registered for the degree in 2006 retrospectively to 2005 to enable him graduate in 2006.

- [6] The report of the Bawa Committee, among other things, found that the degree was initially failed by the external examiners charged with marking it, but was then passed by a majority vote of three internal examiners of which two were the co-supervisors of the dissertation and the third had never read it.
- [7] One of the co-supervisors was Professor Msweli-Mbanga ("Mbanga"). The Bawa committee in its report referred to a suggestion made to it that, during the time the dissertation was being developed and co-supervised by Mbanga, she and Pillay were in an intimate romantic relationship. The committee accordingly recommended that a letter be written to Pillay asking whether there was an intimate relationship while Mbanga acted as a co-supervisor. The committee stressed that a failure to answer the question or any conclusion that there was nepotism in the award of the degree could lead to disciplinary action. Furthermore, UKZN had been provided with information that Pillay had paid Mbanga an amount of R80 000. UKZN felt that an unusual payment by a student to his supervisor required explanation. Accordingly, after receiving the report of the Bawa committee, a sub-committee convened by the Council to deal with the report, addressed a letter seeking answers to the two questions of possible impropriety. Pillay declined to furnish a direct response to the questions.
- [8] On 27 November 2006, the sub-committee decided that steps should be taken to withdraw Pillay's degree. Later that same day an emergency meeting of the Council was called. The reason for the emergency meeting of Council was that Mbanga had lodged a complaint of sexual harassment against the chairman of Council and the vice-chancellor of the UKZN. The Council resolved at that meeting to establish what became known as the Magid Tribunal and *inter alia* took the decision that the report of the Bawa Committee be temporarily put on hold.
- [9] The main issue referred to the Magid Tribunal was the allegation of sexual harassment, but the terms of reference in the Council's resolution also

required investigation of whether there were any irregularities in the awarding of the MComm degree to Pillay.

- [10] The Magid Tribunal commenced in December 2006. Evidence was taken under oath. Pillay was called on three separate occasions. The Tribunal made key credibility findings against Mbanga and Pillay, disbelieving their denials that there had been an intimate relationship and that Pillay had paid R80 000 to Mbanga. In particular, it rejected Pillay's denials that he had in the past mentioned the affair and the payment to the vice-chancellor (Professor Makgoba), a member of the executive (Professor Mazibuko), Mr. Brian Leslie (an internal legal adviser) and Mr. Richard Pemberton, an attorney.
- [11] After considering the report of the Magid Tribunal, the Council adopted a resolution on 16 January 2007 that Pillay should be dismissed for lying to the Tribunal. Notwithstanding the resolution, the Deputy Director Human Resources was instructed to take the necessary steps to set up a disciplinary enquiry to afford Pillay an opportunity to deal with the Council's wish to terminate his employment on the ground that it had lost trust in him by reason of his untruthful testimony to the Tribunal which, given his senior position, had destroyed the employment relationship.¹

The disciplinary enquiry before Pretorius SC

- [12] In a letter dated 1 February 2007, the Deputy Director: Human Resources informed Pillay that when he testified before the Magid Tribunal he falsely alleged that the vice-chancellor, the chairperson of Council, Professor Mazibuko and the university's legal representatives had lied in order to implicate him as part of a greater conspiracy against him. This evidence was not believed by the Tribunal and destroyed the relationship of trust. Accordingly, a disciplinary enquiry chaired by Pretorius SC had been mandated to hear evidence and submissions and asked on the strength thereof to make factual findings as to whether the employment relationship

¹ The wording of the initial resolution caused some controversy about the manner in which the matter had been handled. This was resolved on 16 February 2007 when the Council ratified all decisions taken with regard to Pillay after the Council meeting of 16 January 2007.

has been destroyed as a result of the loss of trust and to provide a recommendation with regard to the appropriate sanction.

- [13] The disciplinary hearing before Pretorius SC endured over many days in the period between March and July 2007. Pretorius SC handed down his findings and recommendation of dismissal on 15 August 2007. In view of the limited nature of the issues before us, it is not necessary to traverse the evidence before the disciplinary hearing. Suffice it to say that Pillay's legal representatives never put it to any witness who testified that either of the two alleged lies was not a lie.
- [14] Three senior UKZN witnesses (the vice-chair of Council, Mr Mia; the vice-chancellor, Professor Makgoba; and a member of Council and chair of the Audit and Risk Committee, Mr Luthuli), testified before the disciplinary enquiry that they no longer trusted Pillay and could not continue to work with him. Pillay's position as Chief Finance Officer involved him in matters requiring complete faith and trust and that the employment relationship had in those circumstances completely broken down. Professor Makgoba explained that it was impossible for Pillay to return to his post because of the way in which matters had developed, and this had destroyed their working relationship completely.
- [15] During his testimony before the disciplinary enquiry on 14 and 15 July 2007, Pillay admitted the R80 000 payment to Mbanga. He had denied the payment before the Magid Tribunal and had alleged that those he told about the payment had not been truthful in their evidence to the Tribunal. He conceded he misled the Tribunal and thus had damaged trust but said that he felt the relationship could be repaired. He justified his dishonesty as a split second decision at a moment when the question was posed. He then persisted in that lie elaborating upon it on the subsequent occasions he testified. He conceded that he ought not to have done so and that he exacerbated the position by contending that the others who were in fact telling the truth on the topic were lying and falsely said that they were doing so as part of a conspiracy instigated against him by the vice-chancellor.

[16] The witnesses called by Pillay at the enquiry added nothing to the relevant facts regarding Pillay's dishonest misconduct. They essentially testified about the backdating of his registration and gave evidence in mitigation related to his character, teaching competence and personal circumstances.

[17] The ultimate finding of Pretorius SC reads as follows:

'I find that there is, as a matter of fact, an irretrievable breakdown in the trust relationship between Professor Pillay and his employer the UKZN. Clear evidence of this was given in the disciplinary hearing by Professor Makgoba and others. This evidence was backed by objective factual circumstances warranting that conclusion.

It is common cause that Professor Pillay advanced an amount of R80 000 to Professor Msweli-Mbanga. I find that he told as much to Professor Makgoba on 26 June 2006. I accept Professor Makgoba's evidence in this regard. It was clear and consistent. It also accords with all the probabilities. Two findings flow from this. First, that Professor Pillay lied under oath to the Magid Tribunal. It was an elaborate and calculated lie. This against the background of his duty to deal fully and honestly with the subject matter of the enquiry. The inevitable consequence of his lies in this regard is the direct allegation that Professor Makgoba, the Vice-Chancellor of the University, was himself deliberately dishonest when he testified before the Magid Tribunal. On this basis I am satisfied that Professor Pillay made himself guilty of conduct which contributed directly to an irretrievable breakdown in the relationship of trust between himself and the University.

In the light of all the evidence, I conclude as a matter of probability that Professor Pillay did indeed have a romantic and sexual affair with Professor Msweli-Mbanga. Further I find, as a matter of fact, that Professor Pillay related as much to Professor Makgoba on 26 June 2006. That such an affair took place is consistent with other evidence, including, importantly, Professor Msweli-Mbanga's admitted subsequent aggressive conduct towards Professor Pillay. Further, if Professor Pillay indeed told Professor Makgoba on 26 June 2006 that he had been involved in an intimate sexual relationship with Professor Msweli-Mbanga one is driven to the conclusion that that was indeed the case. There is no feasible reason for Professor Pillay to have distorted the truth on this occasion.

There are ultimately two findings that I make in this regard. The first is that Professor Pillay lied to the Magid Tribunal when he asserted that he had not conducted an intimate sexual relationship with Professor Msweli-Mbanga. It follows that he also lied to the disciplinary enquiry in this regard. The second finding is that Professor Pillay lied to the Magid Tribunal when he denied that he had told Professor Makgoba that he had conducted an intimate sexual relationship with Professor Msweli-Mbanga. In doing so, Professor inevitably accused Professor Makgoba of serious dishonesty. On the basis of either finding (or on both) the conclusion that Professor Makgoba and others correctly and justifiably asserted that the relationship of trust had broken down irretrievably follows.

Accordingly, I find that the relationship of trust between Professor Pillay and the UKZN has broken down irretrievably.'

- [18] The letter of UKZN to Pillay dated 1 February 2007, setting out the charges and the details of the intended disciplinary process, made it plain that Pretorius SC was mandated "to provide a recommendation with regard to the appropriate sanction" and that the UKZN intended to ask Pretorius SC to make a recommendation to the Council "that the appropriate sanction is summary dismissal". His finding on sanction reads as follows:

'I have taken into account evidence relating to Professor Pillay's record of performance at the UKZN. However, I find that the conduct of Professor Pillay that led to the breakdown of the relationship of trust between himself and his employer is of the most serious nature. The latter outweighs the former

In relation to the contention that my findings notwithstanding, Professor Pillay should continue to be employed in the capacity as an Associate Professor or lecturer, I am not persuaded that this should be the outcome. Firstly, one is here dealing with the relationship of employment between an employer and employee and not particular contracts which make up that relationship. But more importantly, I accept the evidence of Professor Makgoba that the breakdown of trust goes to the root of the relationship between employer and employee and my findings must apply in whatever capacity the employment relationship might find its expression.

Accordingly, I recommend that Professor Pillay be dismissed with effect from the date upon which my recommendation might be accepted by Council.'

The Council Resolution

[19] The minutes of the Council Meeting of 31 August 2007 record the following resolution:

'Recommendation on the Pillay Enquiry

It was NOTED that the report from the disciplinary committee had been sent to all members under separate cover.....

Dr Maphai referred to the recommendation in the report which recommended that Prof PS Pillay be dismissed with immediate effect. He enquired from Council whether any member believed that the findings of Advocate Paul J Pretorius SC were in conflict with the decisions of Council, or whether there were any material factors that would have affected the Council decisions taken had these factors been known at the time that the decisions were taken. In the absence of any objections by Council members, the Chair called for a proposal.

It was proposed that the report be accepted.

Council UNANIMOUSLY APPROVED that the report by Advocate Paul Pretorius be accepted.'

The first arbitration award and Labour Court review

[20] The resolution was implemented, Pillay was dismissed and he then referred a case of unfair dismissal to the CCMA. At the CCMA arbitration, the bundle of documents and the transcript of the hearings before Judge Magid and Pretorius SC were agreed to be accurate reflections of the evidence and true copies of the documents and were handed in on that basis by consent. Mr Mia gave evidence on behalf of UKZN. He testified to the reason why trust had broken down and the unanimous resolution which was passed by Council. Pillay testified that even though the relationship had broken down because of

his dishonesty, the decision to dismiss was unfair, because there was a prospect the relationship could be restored through mediation. The commissioner found that dismissal was an appropriate sanction for the dishonest misconduct.

[21] In the review proceedings before Van Niekerk J, Pillay contended that the commissioner committed a gross irregularity in that she had failed to determine the issue of procedural fairness and alternatively that the dismissal was procedurally unfair in that the Council had taken a decision to dismiss Pillay in January 2007, before the appointment of the disciplinary enquiry, and was thus pre-disposed to dismissing him. It was contended further that certain members of the Council who participated in the vote on the Pretorius report on 31 August 2007 ought to have recused themselves on account of a conflict of interest and that Pillay ought to have been given an opportunity before a vote was taken to make submissions on the recommendation that he be dismissed.

[22] In relation to the issue of substantive fairness, Van Niekerk J held that the commissioner's conclusion that the trust relationship had been irretrievably damaged and thus that dismissal was an appropriate sanction was "not one that can be said to fall outside of the band of decisions to which reasonable people could come". On the question of procedural fairness, the learned judge however stated:

'In the present matter, as I have noted, it is common cause that the commissioner does not deal expressly with the attack on procedural fairness, despite the fact that the applicant raised the issue both in the referral of his dispute and in the heads of argument filed after the arbitration proceedings. I am not able to imply from the terms of the award any decision on the fairness of the procedure adopted by the university in relation to the applicant's dismissal, especially those submissions that concern the 'post-Pretorius' phase of the disciplinary process, i.e. the averments of bias in regard to the university council's decision to accept Pretorius's recommendation, and the failure by the council to afford the applicant an opportunity to make submissions on whether Pretorius's recommendation should be accepted. The award does not lend itself to a rejection of the applicant's contentions

regarding procedural unfairness: they simply appear to have been left in limbo. In these circumstances, I am driven to conclude that the commissioner failed to determine a material element of the dispute between the parties and that her failure to do so constitutes a reviewable irregularity.'

On that basis, the Labour Court remitted the matter to the commissioner and directed her "to determine whether the applicant's dismissal was procedurally fair".

The second arbitration award

[23] In her second amplified award, dated 1 October 2011, the commissioner held that the issue of procedural fairness basically turned on two key questions: firstly, whether Pillay had been given a proper opportunity to be heard on the question of sanction; and secondly whether the process followed by the Council after receiving the Magid Tribunal report was in accordance with the requirements of fairness.

[24] Unfortunately, the arbitration award does not deal with the issues coherently, but a reading of it as a whole reveals that the commissioner was persuaded that Pillay had had ample opportunity in the disciplinary enquiry to deal with the question of sanction and in fact had done so, as was evident from the nature of the testimony of the witnesses who testified on his behalf, and upon which Pretorius SC explicitly relied when making his finding regarding sanction.

[25] As regards the Council's resolutions, the commissioner found that, although the terms of the Council resolution in January 2007 had indicated its preference for dismissal, subsequent events had ensured a fair process at the instance of Pretorius SC, a highly experienced and respected counsel. While it might have been preferable for those Council members who testified at the disciplinary hearing to have recused themselves from the proceedings of the Council on 31 August 2007, the vote to accept the recommendation of Pretorius SC was unanimous, meaning that the participation of those persons at the Council meeting did not materially or adversely affect the outcome. Moreover, in terms of the governing statute, it is the Council that has authority

to dismiss a senior staff member like Pillay. It had taken that decision by a proper vote on an informed basis, relying on the comprehensive report of Pretorius SC.

[26] The commissioner also dealt with the matter of Pillay's right to an internal appeal. It was common cause that the applicant filed his appeal out of time and that the UKZN refused to grant condonation for the late filing. No further evidence was led in this regard before the commissioner and thus she was not able to conclude that the UKZN's decision not to receive the appeal was procedurally unfair.

[27] Lastly, Pillay also submitted that it was procedurally unfair of UKZN to have refused to pay his legal costs at the disciplinary hearing as this had meant the process was not "evenly balanced". The commissioner held that there was no evidence of any UKZN policy in terms of which the legal fees of employees who face disciplinary hearings were paid by the university.

[28] The commissioner accordingly ruled that the dismissal of Pillay was not procedurally unfair.

The merits of the review of the second arbitration award

[29] Pillay filed an application to review the second arbitration award on 6 December 2011, seeking the setting aside of the award and an order directing UKZN to pay him compensation of six months remuneration. The matter was heard on 16 July 2014 and Fouche AJ delivered her judgment 30 October 2014. The judge upheld the review (without setting aside the award) and, for reasons not explained, awarded compensation of 10 months remuneration, being an amount in excess of that requested by Pillay in his application.

[30] In truth, the judgment of Fouche AJ is difficult to follow. There is no clear delineation between submissions of the parties that the judge merely repeated and findings made in the judgment. However, she found that the disciplinary enquiry before Pretorius SC suffered various procedural flaws. Most significantly, she held that it was procedurally unfair not to have afforded Pillay a second opportunity to deal with mitigation of sanction.

[31] The commissioner in her amplified award provided clear reasons for finding that a second hearing was not necessary in the circumstances since the issue before the disciplinary enquiry was whether the trust relationship had broken down and that this was understood by Pillay who led evidence on that issue specifically. In the commissioner's opinion, it was appropriate and procedurally fair for the question of sanction to have been dealt with as part and parcel of the hearing.

[32] In our view, the commissioner's finding is correct and certainly one that a reasonable commissioner could arrive at on the material before her. The lies Pillay told at the Magid Tribunal quite evidently destroyed trust and once the lie was admitted Pillay's defence was primarily aimed at mitigation of sanction to show that notwithstanding his admitted dishonesty he had a good track record, long service and should be forgiven. That was the tenor of the case Pillay presented to Pretorius SC. In the premises, no purpose would have been served by having two separate hearings, one on guilt and the other on mitigation of sanction. In any event, as a general rule, there is nothing unfair about both aspects being decided in one hearing. The case was whether, having regard to the proven dishonesty, continued employment was possible. In his finding on sanction, Pretorius SC explicitly indicated that he had relied on the evidence led by Pillay about his qualities and personal circumstances. He had more than sufficient information at his disposal to make that determination, including evidence concerning Pillay's teaching skills and character. Most importantly, he concluded, correctly in our view, that the gravity of Pillay's wrongdoing far outweighed any mitigating personal factors. A second discrete hearing was not required and there was certainly no procedural unfairness in not having held one.

[33] Fouche AJ made no finding whether the commissioner's finding was unreasonable. The learned judge did not provide reasons for why she considered the award so flawed that the decision of the commissioner was one to which no reasonable commissioner could have come on the material before her. In fact, she did not deal with the finding by the commissioner that a separate hearing on mitigation was unnecessary having regard to the nature

of the proceedings and the manner in which the defence was presented. She accordingly erred by failing to address the primary issue on review. The central question of the reasonableness of the award was not asked or answered in her judgment.

[34] Likewise, Fouche AJ did not evaluate the reasonableness of the commissioner's finding that the participation in the unanimous vote of the Council by the three members of Council called as witnesses in the disciplinary enquiry was not procedurally unfair. The Council unanimously approved the recommendation of Pretorius SC, who was appointed specifically to make the relevant factual findings after a full hearing. That some of its members testified at the disciplinary hearing and did not recuse themselves from the Council meeting had no material impact on the Council's decision to dismiss Pillay. The commissioner's finding on this question is likewise a finding that a reasonable commissioner could have made.

[35] The commissioner's findings on Pillay's right to appeal and the issue of paying for his legal representation are equally correct and reasonable. A senior employee who is legally represented by an experienced attorney and senior counsel can reasonably be assumed to know of his right of appeal and the requirements of exercising it. Pillay appealed out of time and made out no clear case for why his non-compliance ought to have been condoned. Similarly, Pillay's claim that he was entitled to have the UKZN pay his costs for legal representation at the disciplinary has no legal basis.

[36] In the premises, the Labour Court erred in concluding that Pillay's dismissal was procedurally unfair and (by implication) that the award of the commissioner was unreasonable. The appeal must accordingly succeed.

[37] The following orders are made:

37.1 The appeal is upheld and the order of the Labour Court of 30 October 2014 is set aside and substituted with the following order:

"The application to review the award of the Second Respondent is dismissed with costs".

37.2 The First Respondent is ordered to pay the costs of the appeal.

JR Murphy
Acting Judge of Appeal

I agree

D Davis
Judge of Appeal

I agree

J Hlophe
Acting Judge of Appeal

LABOUR APPEAL COURT

APPEARANCES:

FOR THE APPELLANT:

Mr IA Cox

Instructed by: Cox Attorneys

FOR THE FIRST RESPONDENT:

In person

LABOUR APPEAL COURT