

SOUTH AFRICA / JUDGMENT

Hadebe v South African Local Government Bargaining Council and Others (D504/12) [2014] ZALCD 26 (11 June 2014) [2014] ZALCD 26

COURT
Labour Court Durban

BEFORE
Mhlongo

CASE / FILE NUMBER
D504/12

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

NOT REPORTABLE

CASE NO: D504/12

In the matter between:

LOVEDALE MODERATE ZIBUYILE HADEBE Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL First Respondent

HUMPHREY NDABA Second Respondent

ETHEKWINI MUNICIPALITY- METRO WATER Third Respondent

Heard: 6 December 2013

Delivered: 11 June 2014

Summary: Review of arbitration award – applicant suspended for non-compliance – found guilty at internal hearing and dismissed. Dismissal found substantively unfair – ordered compensation, but not re-instatement. Section 193(2)

- (b) and section 138(9) of the LRA considered – award reviewed – commissioner committed an irregularity insofar as re-instatement concerned – applicant’s re-instatement without “back-pay” ordered.

MHLONGO A.J

Introduction

- [1] The applicant seeks to have an arbitration award dated 23 April 2012 issued by the Second Respondent, as a panellist of the first respondent, reviewed and set aside in terms of section 145 of the Labour Relations Act no 66 of 1995 (the Act). The application has been opposed by the third respondent, in whose favour the arbitration award was issued.

Background

fact

- [2] The applicant, Ms Lovedale Moderate Zibuyile Hadebe was in the employ of the Third Respondent since January 1999 in the position of senior buyer responsible for the purchase of stock items with EThekweni Water and Sanitation. She was attached to the Supply Chain Management Department of the Third Respondent. The applicant was suspended on 20 November 2006 after investigation of non-compliance with Supply Chain Management Procedures was conducted against her. She was subjected to disciplinary enquiry. Eight charges were preferred against her for non-compliance with Supply Chain Management procedures. She was found guilty on charges 1, 2 and 5 described as:

‘On 15th June 2006 and 22nd June 2006 you failed to:

- a) Perform your task and job responsibilities, diligently, carefully and to the best of your ability, and /or
- b) Obey all lawful and reasonable instructions given by a person having authority and /or
- c) Conduct yourself with honest and integrity, and or
- d) Refrain from wilful or negligent behaviour as you did not adhere to procurement policy and procedures by using preferred suppliers at higher prices without quotations being obtained from other suppliers when you purchased shade cloth from Whiz Trade A, which should it had been purchased from BC Industrial who as per the point system was the most responsive tender, and whom you used before, resulted in additional cost of R11 685 to Council in total. Therefore you contravened 7.2.3 and/or 1.2.4 and/or 1.2.5 and/or 1.2.10 of the Disciplinary Procedure which states that employees should:

- (i) Perform these tasks and job responsibilities diligently, carefully and to the best of your ability; and /or
- (ii) Obey all lawful and reasonable instructions given by a person having authority; and /or
- (iii) Conduct themselves with honest and integrity; and /or
- (iv) Refrain from wilful or negligent behaviour, which may result in the damage of property.

On 30/09/2005 you failed to:

- a) Perform your task and job responsibilities, diligently, carefully and to the best of your ability; and /or
- b) Obey all lawful and reasonable instructions given by a person having authority; and /or
- c) Conduct yourself with honest and integrity; and or
- d) Refrain from wilful or negligent behaviour, as you did not adhere to procurement policy and procedures when cancelling order from suppliers and placing it with another preferred suppliers when you cancelled an order with BC Industrial reasoning that there were too much in stock and then a day later placed an order from Braveziso Trading for same commodity (75x5 bottom pines) without obtaining the necessary quotation from other suppliers. Therefore you contravened clause 1.2.4 and /or 1.2.5 and/or 1.2.10 of the disciplinary Procedure which states that employees should:
 - (i) Perform your task and job responsibilities, diligently, carefully and to the best of your ability, and /or
 - (ii) Obey all lawful and reasonable instructions given by a person having authority and /or
 - (iii) Conduct yourself with honest and integrity, and or

During the period of August 2005 to March 2006 you failed to:

- d) Refrain from wilful or negligent behaviour;
- e) When you did not adhere for procurement policy and procedures by unnecessarily increasing order by gradually enlarging orders of many commodities with roof structures, plastic cups and wooden bags over a period of time. These increased orders were purchased from Meinsana Trading and are well above the average usage of these commodities. Therefore you contravened clause 1.2.3 and/or 1.2.4 and/or 1.2.5 and/or 1.2.10 of the disciplinary Procedure which states that employees should:
 - (i) Perform your task and job responsibilities, diligently, carefully and to the best of your ability; and /or
 - (iv) Refrain from wilful or negligent behaviour, which may result in the damage of property.'

- [3] The applicant was found to have committed the acts of misconduct and the applicant was dismissed. She was not successful in the internal appeal that she lodged. She was aggrieved by her dismissal and a dismissal dispute arose between her and the Third Respondent which she referred to the first respondent for conciliation and when it could not be resolved, to arbitration. The second respondent was appointed to arbitrate it. He found that the dismissal of the applicant to have been substantively unfair and order the first respondent not to reinstate the applicant but ordered her to be compensated for nine months remuneration at a monthly salary of R9133, 72 which total to R82 203, 48. The applicant was not satisfied about the outcome and has instead initiated the present application.

Grounds for review

- [4] The applicant contends that:
- (1) The arbitration award is reviewable because the award is not the one that a reasonable decision maker could have made as the second respondent was obliged to reinstate the applicant when he found that the dismissal was substantively unfair unless any of the fact as contained in section 193(2) of the Labour Relations Act applied;
 - (2) The commissioner failed to apply his mind to the facts and evidence which was properly before him;
 - (3) The reasoning of the commissioner is also criticised for being unjustifiable in the context of the evidence which was presented before him;
 - (4) It is also the applicant's contention that the commissioner in arriving at the conclusion he did, failed to take into account the context in which the incident occurred;
 - (5) The third respondent did not lead any evidence that the trust relationship had irretrievably broken down. On the contrary there was evidence that it could be restored and that the applicant had a good relationship with her erstwhile manager Mr McCullum and his successor Tarryion.

The arbitration award

- [5] The award sets out a comprehensive summary of the evidence before the commissioner. In essence, the evidence presented to the commissioner was as follows:
- a) The respondent's senior internal audit Pat Naidoo testified that she conducted forensic audit in the buying section of buying and sanitation where she discovered irregularities which resulted in the dismissal of the applicant.
 - b) The second witness Avnesh Ramlahl testified that he worked in the IT Department as a senior system administrator. He testified that the fax system show that the fax was viewed by the user ID. The fax went to the unique ID of the applicant at 11:13

- c) The third witness Dawchand Ramdham testified that he was the senior audit clerk responsible for field work. He testified that his duties were to see physical quotations. He unpacked the supply chain management procurement in respect of buying. He stated that the applicant told him that she did not obtain quotations for stop cogs.
- d) The fourth witness Barbara Ann Hume testified that she has been a senior buyer since 1990. She testified that the buyers have to receive three quotations. She further testified that they used an electronic faxing system called right fax to send quotations to three or four suppliers, at 11:00 the following day the quotations will close. She did not recall dealing with fax [.....].
- e) The fifth witness was Neal Allister McLeod who testified that he was the Head of Water and Sanitation since 1992. They decided to charge the applicant after receiving a report from the auditors. They further decided to institute criminal and civil action against the applicant of which he discovered in 2007 that it had not happened. He

testified that they would revisit Connie Mkhize's matter of cover quoting since she was implicated by the auditors report. The auditors recommended that disciplinary action be instituted against her after it was discovered that two companies who were requested to quote by Connie Mkhize, quoted the same prices, their ownership and address details were also similar. There was a cover quoting of R375.000. He testified that they decided to start with applicant's case and then they will look at Connie Mkhize's case. He testified that they did not follow up after applicant was found guilty and also auditors did not follow up the issue.

- f) The sixth witness Collin Govender testified that he was a member of BC Industrial and Engineering suppliers. He testified that he had a balance of the stock of the third respondent since he previously did not deliver the whole order of 20 September 2005 because the third respondent did not have enough space. He testified that he was told by Connie Mkhize that the same order was placed with other service provider on the following day i.e. 29 September 2005.
- [6] The seventh witness Rajendra Jugdeo testified that he worked for East of Eden. He previously worked for V.K Distributions for three years as a driver. He testified that whilst at VK Distributions he was party to a conversation where Terrance Naidoo was a sales representative for D.K Distributions. He asked for a cheque to be cashed and given to the applicant.
- [7] The eighth witness David Vincent Cloute testified that he was the head of human resources since 1991. He testified that in regard to allegation of irregularities in the report of 23 February 2009 relating to a breach of the SCM, disciplinary action was recommended against four employees that was Megan Naidoo, Ravin Naidoo, Devan Govender and Ramka Naidoo.
- [8] Applicant's case was that she started working for respondent in 1999. She became a senior buyer in 2003 until 20 November 2006 when she was suspended. She only received her charges in January 2007. She testified that when the audit took place, she was at Prior Road.

She was moved from Springfield to Prior Road because, among other reasons, a buyer who worked with Barbara left and also because of the strained relations with her colleagues after she was promoted to the position of the senior buyer. Her evidence in the files was destroyed by the respondent. She testified that she believed that she was charged to prevent her taking the position of Terry McCullum who was going to retire in 3 years. In respect of charge 1, she obtained three quotations which was left at Springfield office and nobody asked for quotations. In respect of charge 2, Connie Mkhize ordered stock from BC Industrial which had failed to deliver the previous order at the required time. She cancelled the order and sourced stock from another supplier. She did not obtain quotations because it became an emergency.

Analysis of evidence and submissions

- [9] In determining whether the arbitration award of the commissioner should be interfered with and in applying the reasonable decision-maker

test, consideration is to be given to the reasons proffered by the commissioner in arriving at the conclusion that the dismissal of the applicant was fair. The case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,^[1] in applying a reasonable decision maker test which has been held to be very strongest, the court is to be cautioned not to impose and apply its own reasonable standard.^[2] Because of the nature of the reasonable decision maker test, the court is often cautioned against blurring the division that it must, in my view, be borne in mind that the applicant had committed an act of dishonesty in that she was found guilty in counts 1, 2 and 5 mentioned above; as such actions entailed a high degree of dishonesty.

- [10] Her actions should further be viewed against the fact that the applicant occupied a position in the workplace which requires her to be honest. The question which needs to be answered is whether her conduct impacted on her employment relationship in such a way that her actions resulted in the breakdown of the trust relationship between her and her employer.
- [11] Trust is considered to be an important element of the employment relationship, whether the employee is employed in private business or within the Public sector. Pillay A.J stated the following in this regard in *Miyambo v CCMA and Others*.^[3]

'13 It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust. In *De Beers Consolidated Mines Ltd v CCMA and Others* [2009] 9 BLLR 995 (LAC) at paragraph 22 the court, per Conradie J.A held the following regarding risk management.'

"Dismissal is not an expression of moral outrage, much less is it act of vengeance, It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. This dismissal has little to do with society's moral opprobrium of minor theft; it has everything to do with the operational

requirements of the employer's enterprise.”

[12] The court has also viewed dishonestly in a very serious light and has come to the conclusion in most instances that it results in a breakdown of the most relationship between the parties. In the case of *Toyota SA Motors (Pty) Ltd v Radebe and Others*,^[4] the LAC went as far as to hold that certain acts of misconduct were so serious that no mitigation factor could save the employee from dismissal. One example would be where the employee is guilty which the court defined as follows:

‘When it is said that the first respondent was guilty of gross dishonesty that must mean dishonesty of such a degree (if one can speak of degree of dishonesty) as to be completely indefensible on any ground.’^[5]

[13] In coming to a conclusion that the dishonest was gross, the court took into account the employee had shown no remorse for his misconduct and that he had persisted in lying to his employer in the legal proceedings that followed.

[14] In various other decisions, the court have similarly held that dismissal is appropriate in circumstances where misconduct involved elements of dishonesty like in *Kalik v Truworths (Gateway) and Others*^[6] where an employee removed a make-up tester from a store without permission. In *Hullet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others*,^[7] the employee was found guilty of unauthorised removal of scrap metal from the premises. In both of these cases, the court was of the view that there was no scope for the application of mitigating factors. In *Shoprite Checkers (Pty) Ltd v CCMA and Others*,^[8] it was held that that the mitigating factors, such as length of service or the relatively insignificant value of items pilfered,

would not hold sway in assessing sanction. Once dishonesty is established, it is deleterious of the trust relationship.

[15] In *De Beers Consolidated Mines Ltd v CCMA and Others*,^[9] the LAC did, however, hold that mitigating factors may justify a sanction short of dismissal even where dishonesty was established.

Conradie J.A in a minority judgment, however, held that where an employee shows no remorse that would be a factor in coming to a conclusion that the trust relationship cannot be mended or restored. Conradie J.A held as follows:

‘This brings me to remorse. It would be in my view being difficult for an employer to re-employ an employee who has shown no remorse.

Acknowledgement of wrong doing is the first step towards rehabilitation. In the absence of a recommitment to the employer’s

workplace value, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee,

over and above having found guilty of having committed an act of dishonesty, falsely denies having committed misconduct, an employer

would, particular where a high degree of trust is reposed in an employee, be legitimately entitled to say to it that the risk of

continuing to employ the offender is unacceptably great.’[10]

[16] The majority, however, held on the specific facts of that case that, although the employees had dishonestly claimed overtime for working on a public holiday, their misconduct could not be categorised as serious. In this case, the arbitrator was allowed to take into account long service in deciding whether to impose a sanction short of dismissal.

[17] It would appear from a reading of Sidumo that the Constitutional Court accepted that where dishonesty is not an element of the misconduct, dismissal may not be an appropriate sanction and that progressive discipline may be appropriate.[11]

[18] In other words, the role of the court in review is not to determine the correctness of the decision reached by the commissioner but to confine itself to the reasonableness of the decision. The danger of blurring the distinction between review and appeal arise more particularly where the complaint by the applicant is that the commissioner committed a mistake of law or fact. It is true that the court should interfere only where the mistake of law or facts is of such a nature that it can be said that there has been a denial of a fair trial.

[19] The evaluation of whether to interfere with the decision of a commissioner has to be conceptually located within the context where the law has vested the power to determine the fairness of the dismissal with the commissioner. The power is of course not unfettered. The commissioner exercise the power by answering the question “is the dismissal in the circumstances fair?”

[20] In arbitration proceedings, it is only the commissioner who has to answer this question.[12] In answering the question, the commissioner has to take into account the material properly before him or her, including the totality of the circumstances of the given case.

[21] The commissioner is by virtue of his or her appointment an expert in determining the fairness or otherwise in labour disputes. It is for this reason that the court should not readily interfere with the decision of the commissioner. It is only in an instance where the commissioner, in carrying out his or her duties fails the standard of reasonableness that the court should interfere.

[22] In the present case, the reasonableness of the commissioner’s decision has to be assessed with reference to the following:

- a) The application of principles governing dishonesty;
- b) Principles governing inconsistency in the application of discipline by the 3rd respondent;

- c) The alleged failure by the commissioner to apply his mind to the facts and the evidence presented during the arbitration proceedings.

[23] The important question to be considered in this matter is whether the arbitrator arrived at a reasonable decision that dismissal was appropriate sanction in the circumstances of this case.

The Labour Court has previously said that it was well established that inconsistent application of discipline which is sometimes referred to as the ‘parity rule’ is not as such a rule but an aspect of the principle of fairness. The leading case on this issue is *SACCAWU and Others v Irvin and Johnson Ltd.*[13] In that case, the court in dealing with the same issue had the following to say:

‘It was argued before us by Mr Grobler for the applicants that by not dismissing four employees who had also participated in the

demonstration, the respondent applied discipline inconsistently. Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with large number of offending employees, the best that one can hope for is reasonable consistency. Some consistency is the price to be paid for flexibility, which requires

the exercise of discretion in each individual case. If a chairperson consistently and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality dismissal, a wrong decision can only be unfair if it is capricious or indicated by employer motives or, worse, by a discriminating management policy.’[14]

[24] The Labour Appeal Court, in *NUM and Another v Amcoal Colliery t/a Arnot Colliery and Another*,[15] in determining the fairness of the dismissal of employees who had been dismissed for failing to comply with an instruction, the court said the following:

‘The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated

alike. It was not intended to force an employer to make out the same punishment to employees with different personal circumstances just because they are guilty of the same offence.’[16]

[25] The basis for the principle governing the need for consistency in disciplinary sanction was stated by the Labour Appeal Court in

Gcwensha v CCMA and Others[17] in the following terms:

‘Disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standard.’

The court went further to say that ‘when comparing employees, care should be taken to ensure that the gravity of the misconduct is evaluated’.

[26] The reason upon which the commissioner relied on finding that the third respondent had applied discipline inconsistently are the internal audit report which fingered both applicant and certain Connie Mkhize for different offences which are not depending to the outcome of each other. Even on the version of the third respondent, discipline was inconsistently applied because the report was released seven years after Connie Mkhize had committed her offence. There was no convincing evidence before the commissioner

as to why, if the third respondent regarded the offence as so serious to justify a dismissal, was Connie Mkhize not disciplined and further promoted to the position of the applicant. Thus the gravity of the offence, objectively speaking, was not serious enough to have broken the trust relationship between the parties because Connie Mkhize who had committed almost the same offence was retained and not disciplined.

[27] The other reason why the commissioner found the dismissal to have been unfair concerned the fairness of the sanction of dismissal. Weighing the reasons advanced by the commissioner for this conclusion. I have not been able to find a basis upon which I can fault him for unreasonable on the issue of unfair dismissal.

[28] The applicant argued that the award is nevertheless reviewable for unreasonableness as contemplated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*. The main argument being that once the arbitrator forwards that the dismissal was substantively unfair, he should have re-instated the applicant taking into consideration that the unfairness is based on inconsistency and Connie Mkhize was promoted to the position of the applicant after both of them were fingered by internal audit report.

[29] The decision reached by the commissioner on not re-instating the applicant after taking into consideration that the dismissal was substantively unfair, only due to inconsistency, was because the applicant was not entirely without blame in this matter. Secondly, the applicant has been out of work for more than four years. It does appear to me that the commissioner misdirected himself by relying on the latter two statements. The commissioner was at fault since the length of absence from workplace cannot prevent an

employee from being re-instated or re-employed because he/she has been fighting his case with the employer.

[30] Section 193 of the LRA provides for three remedies for unfair dismissal, i.e. re-instatement, re-employment or compensation. An order of re-instatement restores the status quo ante. The re-employment means that it would be in the discretion of the employer to re-employ him/her to the same or different position.

[31] It does appear anomalous that section 193(2) (b) specifically gives the court or the arbitrator the power to order the employer to re-employ the employee, either in work in which the employee was employed before the dismissal or in other reasonable suitable work on any

terms and from any date not earlier than the date of dismissal, yet it is silent on the terms of an order to reinstate. That must be so because, in the normal cause, an order for re-instatement is indeed retrospective and is designed to place the employee back into the position that he/she occupied before dismissal. But does that mean that an arbitrator does not have the power to re-instate an employee and yet to order the employer to place that employee in a different position? Surely, that does not preclude such an order. The commissioner may make an appropriate arbitration award in terms of the Act including but not limited to, an award that gives effect to the provisions and primary objects of the Act. One of those objects is the effective resolution of labour disputes in terms of section 138(9) of LRA.

[32] I am of the view that applicant should have been re-instated to the same or similar position that she held before dismissal since Connie Mkhize is still in the same department which she occupied.

[33] Having found that the commissioner committed an irregularity in so far as the issue of re-instatement is concerned, I make the following order:

1. The applicant must be re-instated “without back pay” to the position that she occupied before dismissal or be placed to another position which is equivalent to the position she occupied before dismissal.
2. The third respondent is ordered to pay the applicant compensation as per the arbitration award.
3. The third respondent must pay the applicant’s costs on an attorney and own client scale

Mhlongo, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: P.

Shangase.

A.P. Shangase & Associates.

For the Third Respondent: Advocate

L. Naidoo

Instructed by Hughes-Madondo Incorporated.

[1] 2007

(12) BLLR 1027 (CC).

- [2] See the case of Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others
- [2008] 3 BLLR 197 [LAC].
- [3] [2010] 10 BLLR 1017(LAC) at para 13.
- [4] (2000) 21 ILJ 340(LAC) at para 16.
- [5] Ibid at para 26.
- [6] (2007) 28 ILJ 2769 (LC).
- [7] (2008) 29 ILJ 1180 (LC).
- [8] [2008] 9 BLLR 838 (LAC).
- [9] De Beers (supra) at paras 9 and 24.
- [10] Ibid at para 25.
- [11] Sidumo (supra) at paras 116 and 117.
- [12] See Engen Petroleum Ltd v CCMA and Others
(2007) 8 BLLR 707 (LAC) at para 124.
- [13] (1999) 20 ILJ 2303 (LAC).
- [14] Ibid at para 29.
- [15] [2000] 8 BLLR 869 (LAC).
- [16] Ibid at para 19.
- [17] (2006) 3 BLCR 234 (LAC) at para 36.

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