

SOUTH AFRICA / JUDGMENT

UNISA v Solidarity obo Marshall and Others (JR197/08) [2009] ZALC 82; [2009] 5 BLLR 510 (LC); (2009) 30 ILJ 2146 (LC) (13 January 2009) [2009] ZALC 82

COURT
Labour Court

BEFORE
G N Moshwana

CASE / FILE NUMBER
JR197/08

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IN
THE COURT OF SOUTH AFRICA BRAAMFONTEIN
HELD
AT BRAAMFONTEIN
Case
No: JR197/08
REPORTABLE
In

the matter between:

UNISA Applicant
and
SOLIDARITY
obo
DOCTOR
M M MARSHALL First
Respondent
L
NOWOSENETZ N.O Second
Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION Third
Respondent

JUDGMENT

MOSHOANA, AJ

INTRODUCTION

[1] This is an application brought in terms of the provisions of the Labour Relations Act to review and set aside an award made by the Second Respondent. The Second Respondent replaced a sanction of twelve (12) months suspension with a final written warning and a suspension without pay for a period of three months.

BACKGROUND**FACTS**

[2] Doctor Marshall, an employee of the Applicant was charged with allegations of fraud in that he made arrangement for the payment of an amount of R19 451.10 (Nineteen Thousand Four Hundred and Fifty One Rand Ten Cents) payable to one David Mange to mark her

assignment while she indicated that he was her Research Assistant, organising and hosting a workshop for which UNISA paid R40 995.00 while there was no contract in place allowing It and or alternatively without any authority to do so. She appeared before a Disciplinary Committee, which found her guilty and recommended her dismissal with immediate effect. Aggrieved by the finding, Marshall appealed against the finding of guilt and the sanction recommended. An Appeal Committee was constituted. Having considered the matter it came to the conclusion that the sanction of dismissal was too harsh under the circumstances and it imposed a sanction of twelve (12) months suspension without pay. Marshall was aggrieved by the suspension of twelve months without pay and referred the dispute to the Third Respondent for consideration. The Second Respondent was then appointed to determine the dispute. On 12 November 2007, the Second Respondent issued an arbitration award to the effect that the disciplinary action was substantively unfair in that the suspension of twelve months was not authorized also that there was a failure to take the substantial delay in the disciplinary action as a mitigating factor. The Second Respondent set aside the suspension of twelve months and replaced it with a sanction of three months without pay and a final written warning. [3] Aggrieved by the finding, the Applicant launched this application. At the arbitration proceedings no evidence was led as the parties have prepared a stated case. In terms of the said stated case the issues to be considered was whether the sanction of unpaid suspension of twelve months was fair under the circumstances. THE GROUNDS OF REVIEW [4] The Applicant contended that the second Respondent exceeded his powers or alternatively committed irregularity by considering and making a finding that the Appeal Committee had no powers to suspend Marshall for a period longer than three (3) months. [5] Further the Applicant contended that if the arbitrator was correct that he was entitled and or required to consider the powers of the Appeal Committee, the arbitrator in any event by finding that the Appeal Committee exceeded its powers when it decided on a suspension in excess of

three (3) months, made a finding which is not sustainable. Further it was contended that the finding by the arbitrator that the delay in finalising the disciplinary process was not taken into account as a mitigating factor is not sustainable. ARGUMENT [6] In court, Mr Van der Westhuizen appearing for the Applicant contended that the Second Respondent was not entitled to consider the issue of the powers as neither of the parties at the arbitration proceedings raised the issue. In that regard, so the contention

went, there was an excess of power. He further contended that proper consideration of the policy suggest that the Appeal Committee has powers to impose a sanction of more than three months. On the other hand Mr Van Niekerk for the First Respondent contended that the Second Respondent did not exceed powers as the issue whether the Appeal Committee had powers was critical for the determination of the fairness of the sanction imposed. Mr Van der Westhuizen conceded, rightly so, that the issue of powers was critical for the determination of the fairness of the sanction. However he contended that since that issue was not brought up by any of the parties, then the Second Respondent was limited to the parameters drawn by the parties to the dispute. [7] Mr Van der Westhuizen further argued that the sanction of three months suspension is only limited to the Disciplinary Committee and not the Appeal Committee. He submitted that the Appeal committee in determining the issue of sanction is to exercise its own discretion and not be guided by the limitations set out for the Disciplinary Committee. [8] As pointed out earlier Van Niekerk persisted with the argument that the issue was raised and the Second Respondent was invited by the parties to determine the issue. In that regard he referred the court to page 544 of the Bundle wherein the following was stated:- "The disciplinary Code makes provision for suspension for a maximum of three months in clause 3.12.1 (iii) (Bundle B page 45). Clause 3.16 makes provision for an extension of the stipulated period (Bundle B page 46) if valid reasons exist No reasons were given by the Appeal Committee why it deviated from the period stipulated in clause 3.12.1 (Hi)." [9] He further made reference to page 563 of the Bundle wherein the following is apparent:- "The paragraphs place a limitation on the Disciplinary Committee in this regard, in that this committee can only suspend for up to three months. The suspension will also be without pay. No such limitation is placed on the Appeal Committee which is also entitled to increase a sanction". [10] Van Niekerk further argued that the Appeal Committee, once it decides to impose a sanction of suspension, it is bound by the limitation that is applicable to the Disciplinary Committee. In other words, the Appeal Committee cannot, in his argument, impose a sanction of suspension without pay longer than the three months period. He argued that if the contention of Mr Van der Westhuizen is correct, then it means that an employee who was suspended for a period of four months by the Disciplinary Committee, on appeal the committee may find nothing wrong since it has the powers to impose a four months sanction contrary to what the Disciplinary Code and Procedure provides. [11] Further, he argued that the provision of the code is such that the powers of the Appeal Committee is to set aside or amend the decision of the Disciplinary Committee. [12] However, where the sentence recommended by the Committee is to be increased, such can only be done after a staff member was given a reasonable written notice of its intention to do so. In short he submitted that the Appeal Committee exceeded its powers in terms of the sanction, therefore the Second Respondent was correct in considering the issue of

powers. It is clear in this matter that the parties sought not to lead evidence but to make what appears to be largely legal submissions on a particular set of facts that are common cause. The real and the only issue to be considered was whether the sanction of twelve months suspension without pay was fair. The Second Respondent faced with such a question would have to take everything else into consideration to determine the fairness of the sanction. In this instance, fairness, in my view, shall extend to the issue whether there was a breach of the Disciplinary Code and whether the Appeal's Committee was empowered to impose such a sanction. [13] The argument by the Applicant that the issue of the excess of power was not raised by any of the parties and therefore any consideration of that issue renders the conduct of the Second Respondent improper is rejected. In the first instance, it would make no sense for the Second Respondent to ignore a critical aspect for the determination of the fairness of the sanction simply because none of the parties raised it. Dealing with the similar question, *Zondo JP in Maepe v Commission for Conciliation Mediation and Arbitration and Another* (2008) 29 ILJ 2189 (LAC) at paragraph 11 said the following:- "The answer to this argument is that where the law is that the commissioner must take into account a certain factor in deciding a certain question is obliged to take that factor into account even if none of the parties asks him to take into account. When he is obliged to take it into account, it is no defence to say that he was not asked to take it into account, if the factor was a critical one and he did not take it into account he may well have committed a gross irregularity justifying the reviewing and setting aside of his award. Accordingly, the commissioner's omission under discussion is capable of constituting gross irregularity even if the First Respondent did not ask the commissioner to take into account the Appellant's conduct in giving false evidence under oath. Accordingly I am unable to uphold a submission advanced by counsel for the Appellant in this regard". [14] In this matter, it was conceded by Mr Van der Westhuizen that the issue of the powers of the Appeal Committee was critical for the determination of the issue of fairness of the sanction. His argument that the issue was not raised by any of the parties and the Second Respondent in venturing into it exceeded his powers is simply not correct, having regard to what the Labour Appeal Court has said in *Maepe*. However, I agree with Mr Van Niekerk that the Second Respondent was invited to venture into the question whether the Appeal Committee had powers or not. This is apparent from the references that I have quoted earlier, wherein issue of the powers of the Appeal committee was raised. The Applicant, in particular, stated in its submission that the three months limitation finds no application to the Appeal Committee. Clearly that submission suggests that the Second Respondent had to apply his mind to the question whether the three months period applies only to the Disciplinary Committee to the extent that the Appeal Committee would have acted within its powers. Accordingly having been so invited, it is not appropriate for the Applicant to argue that because the Second Respondent had dealt with the issue he exceeded his powers. This being a review application, I am not entitled to consider whether the Second Respondent was correct in his interpretation of the policy to suggest that there was excess of power. However, I must state that the argument that Appeal Committee has wide discretionary powers to impose a sanction in excess of three months seem to be incorrect. It makes no sense if the Appeal Committee, which is ordinarily given powers to supervise the Disciplinary Committee, can sanction something that the Disciplinary committee did not have powers to do. For instance if

the Disciplinary Committee imposes a sanction of four months suspension without pay, if the argument by Mr Van Der Westhuizen is anything to go by, the Appeal Committee may only acknowledge that the Disciplinary Committee did not have powers but still confirm such a sanction imposed outside the committee's powers. That does not make sense. Further it makes no sense that the Appeal Committee would not be guided by the same Disciplinary Code and Procedure that guides the Disciplinary Committee, particularly when it comes to the issue of sanction. There seem to be no justification in law for such

a disparity which evinces unfairness. If the argument is correct, it simply means that employees would be saddled with a sanction

imposed by the Disciplinary Committee albeit in excess of its powers. In other words once a Disciplinary Committee imposes a

sanction outside its powers such can be justified on appeal. I do not think that such would be a correct and proper interpretation of the policies of the Applicant. In short, I am saying that the Disciplinary Committee and the Appeal's Committee are to be bound by the same limitation on the Issue of the suspension without pay. (See *Highveld District Council v CCMA and Others* (2000) 21 ILJ 517 (LAC)). [15] In the result, applying the Sidumo test, I find nothing unreasonable about the decision that was arrived at by the Second Respondent. Given the material that was placed before the Second Respondent, the decision that he arrived at is one that a reasonable decision-maker, faced with the issue of fairness of a sanction would have arrived at. I had already pointed out that I find no fault in the process that was followed leading to the decision. The fact that he ventured into the issue of the powers of the Appeal Committee does not suggest that he exceeded his powers. Accordingly there exists no basis upon which this award could be interfered with. On the issue of the delay, I cannot fault the Second Respondent's own sense of fairness. In his own sense, which I cannot interfere with; the delay should have served as a mitigating factor. (See *Engen Petrol Ltd v CCMA* (2007) JOL 20042 (LAC)).

CONCLUSION

[16] Having carefully considered the matter I find that the grounds persisted with by the Applicant should fail. In the result I make the following order:- 1. The review application is dismissed with costs. G. N MOSHOANA Acting Judge of the Labour Court Date of Hearing: 04 December 2008 Date of Judgment: 13 January 2009 APPEARANCES For the Applicant: Mr Van Der Westhulzen For the Respondents: Eugene Van Niekerk (Union Official from Solidarity)

JUDGMENT

MOSHOANA, AJ

INTRODUCTION

- [1] This is an application brought in terms of the provisions of the Labour Relations Act to review and set aside an award made by the Second Respondent. The Second Respondent replaced a sanction of twelve (12) months suspension with a final written warning and a suspension without pay for a period of three months.

BACKGROUND

FACTS

- [2] Doctor Marshall, an employee of the Applicant was charged with allegations of fraud in that he made arrangement for the payment of an amount of R19 451.10 (Nineteen Thousand Four Hundred and Fifty One Rand Ten Cents) payable to one David Mange to mark her

assignment while she indicated that he was her Research Assistant, organising and hosting a workshop for which UNISA paid R40 995.00 while there was no contract in place allowing It and or alternatively without any authority to do so. She appeared before a Disciplinary Committee, which found her guilty and recommended her dismissal with immediate effect. Aggrieved by the finding, Marshall appealed against the finding of guilt and the sanction recommended. An Appeal Committee was constituted. Having considered the matter it came to the conclusion that the sanction of dismissal was too harsh under the circumstances and it imposed a sanction of twelve (12) months suspension without pay. Marshall was aggrieved by the suspension of twelve months without pay and referred the dispute to the Third Respondent for consideration. The Second Respondent was then appointed to determine the dispute. On 12 November 2007, the Second Respondent issued an arbitration award to the effect that the disciplinary action was substantively unfair in that the suspension of twelve months was not authorized also that there was a failure to take the substantial delay in the disciplinary action as a mitigating factor. The Second Respondent set aside the suspension of twelve months and replaced it with a sanction of three months without pay and a final written warning.

- [3] Aggrieved by the finding, the Applicant launched this application. At the arbitration proceedings no evidence was led as the parties have prepared a stated case. In terms of the said stated case the issues to be considered was whether the sanction of unpaid suspension of twelve months was fair under the circumstances.

THE GROUNDS OF REVIEW

- [4] The Applicant contended that the second Respondent exceeded his powers or alternatively committed irregularity by considering and making a finding that the Appeal Committee had no powers to suspend Marshall for a period longer than three (3) months.

- [5] Further the Applicant contended that if the arbitrator was correct that he was entitled and or required to consider the powers of the Appeal Committee, the arbitrator in any event by finding that the Appeal Committee exceeded its powers when it decided on a suspension in excess of three (3) months, made a finding which is not sustainable. Further it was contended that the finding by the arbitrator that the delay in finalising the disciplinary process was not taken into account as a mitigating factor is not sustainable.

ARGUMENT

- [6] In court, Mr Van der Westhuizen appearing for the Applicant contended that the Second Respondent was not entitled to consider

the issue of the powers as neither of the parties at the arbitration proceedings raised the issue. In that regard, so the contention

went, there was an excess of power. He further contended that proper consideration of the policy suggest that the Appeal Committee has powers to impose a sanction of more than three months. On the other hand Mr Van Niekerk for the First Respondent contended that the Second Respondent did not exceed powers as the issue whether the Appeal Committee had powers was critical for the determination of the fairness of the sanction imposed. Mr Van der Westhuizen conceded, rightly so, that the issue of powers was critical for the determination of the fairness of the sanction. However he contended that since that issue was not brought up by any of the parties, then the Second Respondent was limited to the parameters drawn by the parties to the dispute.

- [7] Mr Van der Westhuizen further argued that the sanction of three months suspension is only limited to the Disciplinary Committee and not the Appeal Committee. He submitted that the Appeal committee in determining the issue of sanction is to exercise its own discretion and not be guided by the limitations set out for the Disciplinary Committee.
- [8] As pointed out earlier Van Niekerk persisted with the argument that the issue was raised and the Second Respondent was invited by the parties to determine the issue. In that regard he referred the court to page 544 of the Bundle wherein the following was stated:-

"The disciplinary Code makes provision for suspension for a maximum of three months in clause 3.12.1 (iii) (Bundle B page 45). Clause 3.16 makes provision for an extension of the stipulated period (Bundle B page 46) if valid reasons exist No reasons were given by the Appeal Committee why it deviated from the period stipulated in clause 3.12.1 (Hi)."

- [9] He further made reference to page 563 of the Bundle wherein the following is apparent:-

"The paragraphs place a limitation on the Disciplinary Committee in this regard, in that this committee can only suspend for up to three months. The suspension will also be without pay. No such limitation is placed on the Appeal Committee which is also entitled to increase a sanction".

- [10] Van Niekerk further argued that the Appeal Committee, once it decides to impose a sanction of suspension, it is bound by the limitation that is applicable to the Disciplinary Committee. In other words, the Appeal Committee cannot, in his argument, impose a sanction of suspension without pay longer than the three months period. He argued that if the contention of Mr Van der Westhuizen is correct, then it means that an employee who was suspended for a period of four months by the Disciplinary Committee, on appeal the committee may find nothing wrong since it has the powers to impose a four months sanction contrary to what the Disciplinary Code and Procedure provides.
- [11] Further, he argued that the provision of the code is such that the powers of the Appeal Committee is to set aside or amend the decision of the Disciplinary Committee.
- [12] However, where the sentence recommended by the Committee is to be increased, such can only be done after a staff member was given a reasonable written notice of its intention to do so. In short he submitted that the Appeal Committee exceeded its powers in terms of the sanction, therefore the Second Respondent was correct in considering the issue of powers. It is clear in this matter that the parties sought not to lead evidence but to make what appears to be largely legal submissions on a particular set of facts that are common cause. The real and the only issue to be considered was whether the sanction of twelve months suspension without pay was fair. The Second Respondent faced with such a question would have to take everything else into consideration to determine the fairness of the sanction. In this instance, fairness, in my view, shall extend to the issue whether there was a breach of the Disciplinary Code and whether the Appeal's Committee was empowered to impose such a sanction.
- [13] The argument by the Applicant that the issue of the excess of power was not raised by any of the parties and therefore any consideration of that issue renders the conduct of the Second Respondent improper is rejected. In the first instance, it would make no sense for the Second Respondent to ignore a critical aspect for the determination of the fairness of the sanction simply because none of the parties raised it. Dealing with the similar question, Zondo JP in *Maepe v Commission for Conciliation Mediation and Arbitration and Another* (2008) 29 ILJ 2189 (LAC) at paragraph 11 said the following:-

"The answer to this argument is that where the law is that the commissioner must take into account a certain factor in deciding a certain question is obliged to take that factor into account even if none of the parties asks him to take into account When he is obliged to take it into account, it is no defence to say that he was not asked to take it into account, if the factor was a critical one and he did not take it into account he may well have committed a gross irregularity justifying the reviewing and setting aside of his award. Accordingly, the commissioner's omission under discussion is capable of constituting gross irregularity even if the First Respondent did not ask the commissioner to take into account the Appellant's conduct in giving false evidence under oath. Accordingly I am unable to uphold a submission advanced by counsel for the Appellant in this regard".

[14] In this matter, it was conceded by Mr Van der Westhuizen that the issue of the powers of the Appeal Committee was critical for the determination of the Issue of fairness of the sanction. His argument that the issue was not raised by any of the parties and the Second Respondent in venturing into it exceeded his powers is simply not correct, having regard to what the Labour Appeal Court has said In Maepe. However, I agree with Mr Van Niekerk that the Second Respondent was invited to venture into the question whether the Appeal Committee had powers or not. This is apparent from the references that I have quoted earlier, wherein issue of the powers of the Appeal committee was raised. The Applicant, in particular, stated in its submission that the three months limitation finds no application to the Appeal Committee. Clearly that submission suggests that the Second Respondent had to apply his mind to the question whether the three months period applies only to the Disciplinary Committee to the extent that the Appeal Committee would have acted within its powers. Accordingly having been so invited, it is not appropriate for the Applicant to argue that because the Second Respondent had dealt with the issue he exceeded his powers. This being a review application, I am not entitled to consider whether the Second Respondent was correct in his interpretation of the policy to suggest that there was excess of power. However, I must state that the argument that Appeal Committee has wide discretionary powers to impose a sanction in excess of three months seem to be incorrect. It makes no sense if the Appeal Committee, which is ordinarily given powers to supervise the Disciplinary Committee, can sanction something that the Disciplinary committee did not have powers to do. For instance if the Disciplinary Committee imposes a sanction of four months suspension without pay, if the argument by Mr Van Der Westhuizen is anything to go by, the Appeal Committee may only acknowledge that the Disciplinary Committee did not have powers but still confirm such a sanction imposed outside the committee's powers. That does not make sense. Further it makes no sense that the Appeal Committee would not be guided by the same Disciplinary Code and Procedure that guides the Disciplinary Committee, particularly when it comes to the issue of sanction. There seem to be no justification in law for such

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[15] In the result, applying the Sidumo test, I find nothing unreasonable about the decision that was arrived at by the Second Respondent. Given the material that was placed before the Second Respondent, the decision that he arrived at is one that a reasonable decision-maker,

faced with the issue of fairness of a sanction would have arrived at. I had already pointed out that I find no fault in the process that was followed leading to the decision. The fact that he ventured into the issue of the powers of the Appeal Committee does not suggest that he exceeded his powers. Accordingly there exists no basis upon which this award could be interfered with. On the issue of the delay, I cannot fault the Second Respondent's own sense of fairness. In his own sense, which I cannot interfere with; the delay should have served as a mitigating factor. (See *Engen Petrollum Ltd v CCMA (2007) JOL 20042 (LAC)*).

CONCLUSION

[16] Having carefully considered the matter I find that the grounds persisted with by the Applicant should fail. In the result I make the following order:-

1. The review application is dismissed with costs.

G. N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 04 December 2008

Date of Judgment: 13 January 2009

APPEARANCES

For the Applicant: Mr Van Der Westhulzen

For the Respondents: Eugene Van Niekerk (Union Official from Solidarity)

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