IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: **JR 1926-21**

CCMA **LP 2542/21**

In the matter between:

MARULENG LOCAL MUNICIPALITY **Applicant**

and

CCMA **First Respondent**

GRACE MAFA CHALI N.O **Second Respondent**

MOHALE CHAMP MACHUBENE **Third Respondent**

Heard : 25 January 2024

Delivered : 20 February 2024

JUDGMENT

NORTON AJ

Introduction

1. Maruleng Local Municipality (the "Municipality" or the "Applicant") has instituted review proceedings in this court to set aside an award handed down by a CCMA Commissioner. Ms Mafa-Chali (the Commissioner" or the "Second Respondent"), in which she found that the dismissal of Mr Machubene (the "employee" or the "Third Respondent") was substantively and procedurally unfair and ordered his reinstatement to the date of dismissal (10 March 2021) with backpay of R300 000.

2. The Third Respondent has conceded that the dismissal was procedurally fair[1], and that disposes of the one leg of the fairness enquiry, with the issue of the substantive fairness of the dismissal requiring interrogation within the lens of the review test set out in section 145 of the Labour Relations Act, 1995 (the "LRA").

3. I set out the factual background below, and then proceed to discuss the relevant legal principles that arise, thereafter I apply the law to the facts and finally I will hand down my ruling.

Factual Chronology

4. The Municipality is based in Hoedspruit in the Limpopo Province. The Local Government: Municipal Structures Act, 1998[2] ("Structures Act") and Local Government: Municipal Systems Act, 2000 [3] ("Systems Act"), and the Municipal Finance Management Act, 2003[4] ("Finance Act") applies to this entity.

5. The employee was employed as the Director: Technical Services on a fixed term contract from 1 November 2018 to 31 October 2023.[5] His remuneration was R50 000 a month.

6. The employee acted as the Municipal Manager from 1 January 2019 to 30 June 2019.

7. The current Municipal Manager (Mr Thabo Magabane) was appointed on 1 July 2019.

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[1] Employee's Supplementary Heads of Argument, at paragraph 46

[2] Act No.117 of 1998

[3] Act No.32 of 2000

[4] Act No.56 of 2003

[5] Founding Affidavit, paragraph 13

8. On 30 July 2020, following an investigation, the Municipality served Mr Machubene with a notice to attend a disciplinary enquiry to answer to 23 misconduct charges.

9. At the conclusion of the disciplinary enquiry he was found guilty of the majority of the charges. Most notably he was found guilty of signing cession agreements without authority on the 27 November 2018; 28 August 2019; 3 September 2019; 29, 30 and 31 October 2019; and 5 and 7 November 2019. He was also found guilty of gross insubordination by failing to execute a lawful instruction to provide investigators with a file pertaining to a contract; as well as gross misconduct by approving an amendment to a scope of work without the authority to do so, and finally gross dereliction of his duties by misleading a service provider about which globes to replace in streets in the Municipality.

10. The presiding officer recommended dismissal, and the council of the Municipality agreed, passing resolution SC01/03/2021 on 22 March 2021 to that effect.

11. On 23 March 2021 the employee’s employment was effectively terminated.

12. The employee referred an unfair dismissal dispute to the CCMA. Conciliation was unsuccessful and he referred the dispute to arbitration.

13. The arbitration was held in June and July 2021.

The CCMA Arbitration

14. At the arbitration the Municipality called Mr Mdhluli to testify about the investigation he had carried out. The investigation led to the institution of the charges, the disciplinary enquiry, and ultimately the employee’s dismissal.

15. The Municipal Manager (“MM”), Mr Thabo Magabane followed and testified that between November 2018 to November 2019, and on 12 different occasions the

employee signed cession agreements[6] purporting to have authority to do so, binding the Municipality to some R5.8 million worth of payments to subcontractors. All the cession agreements involved one service provider called “Lubocon Civils”.[7] Mr Magabane also testified that he had instructed the employee to hand over a file pertaining to a particular project (MLM/SCM/05/2019 and MLM/SCM/09/2019) to investigators, but he failed to do so. He testified further that the employee instructed a service provider (Paino Trading) to install street lights in the wrong locations causing financial loss to the Municipality.

16. The Municipality called two more witnesses, Mr Thabo Shai, and Mr Lesiba Machaba, but their evidence is not material to the issues before this court.

17. The employee in defence testified that he had authority to sign the cession agreements, that the source of authority came from the General Conditions of Contracts (“CTC”) regulating the relationship between the Municipality and contractor. He argued too that there had been a past practice where senior managers (not the Municipal Manager) had signed cession agreements, and that other employees had not been disciplined for doing so. He explained that he no longer had the files relating to the project under investigation as they had been taken by Internal Audit.

18. The employee pointed out that the Municipal Manager had access to the cession agreements when he signed payment certificates, and by implication that if the Municipal Manager was concerned with what he was doing, could have refused to sign the payment certificates.

19. On 18 August 2021 the Commissioner handed down her arbitration award.

20. On 10 September 2021 the Municipality launched it’s review.

The review challenge

[6] An agreement between the Municipality and a sub contractor for payment of services.

[7] Founding Affidavit, paragraph 29

21. The Municipality submits that the Commissioner

21.1. failed to properly consider the evidence before her and attach the appropriate weight in that regard; and

21.2. arrived at conclusions that were not rationally justifiable.[8]

22. The Municipality principally draws attention to the Commissioner's finding that:

22.1. The employer had failed to prove the existence of a rule that prohibited the employee from signing the cession agreements.

22.2. There had been inconsistency with respect to sanction in that other employees had signed cession agreements prior to the employee doing so, and they had not been dismissed.

22.3. The employee had been subjected to "double jeopardy" because he had been reprimanded by the Municipal Manager that only he (ie the MM) had the authority to sign cession agreements, unless he delegated that power in writing to a trusted employee.

23. In the arbitration award the Commissioner writes:

Firstly, I must say from the onset that the Employer has failed to provide the existence of the rule that the Employee breached prohibiting him to sign cession agreements on behalf of the MM or municipality." She reasoned that *"the investigator …could not directly cite the specific legal provisions of the two pieces of legislation (the System Act and the Structures Act)…that support his version that only the MM is authorised to sign documents for the municipality or only signing with delegated powers on behalf of the MM…*"[9]

"*The Employee submitted documentary evidence of the previous years cession agreements signed by his predecessors Reneilwe Mamatlepa, Aliwani Makhadane and Yeta Wasilota. All of them were not dismissed and are still working for the municipality. He (*the employee*) argued that the Employer was inconsistent as his predecessors…were not dismissed…This piece of evidence was not challenged by the Employer except to state that the Employee did not know whether the said*

[8] Founding Affidavit, paragraph 53

[9] Arbitration award, paragraphs 121, 122 and 123.

employees had delegated authority or not…The Employer is expected to apply the rules consistently…"[10]

"*The MM testified and led unchallenged evidence that after realizing that the employee signed the direct payment agreements without authorisation, he was called to a meeting with the Mayor and was reprimanded for his behaviour and the behaviour then stopped. Now if the Employee was given a reprimand which is a form of disciplinary action to correct the behaviour, why would the MM then continue to still charge the employee for the same conduct for which he as reprimanded. This is what is called double jeopardy. Reprimand is a form of progressive disciplinary action. It merely means the Employer has taken disciplinary action against the employee twice for the same misconduct*."[11]

24. Mr Magabane testified on the issue of authority as follows,

"… no other person can sign and commit the municipality without the knowledge of the municipal manager, because I am expected in terms of roles and responsibilities to account to council and other authorities on the happenings in the municipality."[12]

A few minutes later he is asked. " *From the day of your appointment, did you at any stage give the delegation to Mr Machubene to sign on behalf of the municipality or on your behalf*" He replies "*no*".

25. Mr Magabane continues,

"*Now the moment the municipality signs, it validates the form and contents. It no longer comes to the accounting officer for payment…That form and an invoice or delivery note gets presented to the CFO for payment. Then they pay…So the municipal manager or the accounting officer will not even know, because at the first instance did not sign or see the form…So the municipality shall have paid, but the accounting officer would have no clue…His role has been circumvented*"[13]

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[10] Paragraphs 119 and 120

[11] Arbitration award, para 35.

[12] Transcript pg 167

[13] Transcript pg 185,

26. Mr Machubene's representative in cross examination puts to Mr Magabane. "*You approved every single payment*…" Mr Magabane says, *"I will dispute it."*[14]

27. Later when Mr Machubene gives evidence however, it becomes clear that the Municipal Manager signed every payment certificate which included as one of the attachments the cession agreement.[15]

28. Mr Machubene testified that he previously worked at the Mopani District Municipality for 5 years and had similarly signed direct payment agreements. That was the practice, and he continued to do so at the Maruleng Local Municipality until he was stopped by the Municipal Manager.

29. It was common cause that the employee signed the cession agreements (alternatively called "direct payment agreements").

30. It became clear, despite the Municipal Manager's initial denial, that he had ultimately authorised the payments to the sub-contractors. He was thus aware that the employee had signed the agreements for over a year, because he had authorised the payment certificates. That is materially relevant, and compromises the Applicant's case.

31. The Municipal Manger explained why he had not taken disciplinary action against other employees who too had signed cession agreements. He said that those employees may have been authorised by the employee when he was the acting municipal manager, furthermore that there was no evidence that they were not delegated to sign, and finally that such occurrences happened before his appointment. In my view it was unreasonable for the commissioner to discount such a plausible explanation and then find that the employer had acted inconsistently.

The legal issues that arise

[14] Transcript pg 251

[15] Transcript pg 450

32. The authority challenge

32.1. The Municipality's evidence and argument was that only the MM has the authority to sign the cession agreements, unless he had delegated that power to a trusted employee. It is common cause that the MM had not delegated his power to the employee to sign the session agreements.

32.2. The Municipality referred to legislation in support of their view, such as the Systems Act, the Structures Act and the Finance Act.

32.3. The commissioner gave little weight to this evidence, unhappy that it had been presented late.

32.4. Sections 60, 61 and 62 of the Finance Act are relevant to the question of authority. Municipal Managers are the accounting authority of the municipality. They must seek within their sphere of influence to prevent prejudice to the financial interests of the municipality. In addition the accounting officer of a municipality is responsible for managing the financial administration of the municipality and must ensure that the resources of the municipality are used effectively, efficiently and economically. According to section 79 the MM may delegate any function in writing to a member of senior management or an employee.

32.5. According to section 55(2) of the Systems Act the accounting officer is responsible and accountable for all income and expenditure of the municipality.

32.6. The Applicant's witnesses referred to this legislation, even though they could not identify the relevant sections applying to the Municipal Manager and his accounting and financial responsibilities.

32.7. It was incumbent on the Commissioner to have conducted a cursory perusal of the legislation, and to satisfy herself one way or another about the legal standing of the Municipal Manager vis a vis the employee to sign cession agreements.

32.8. Certainly the Municipal Manager has the authority as per the Finance Act and Systems Act discussed above - but what about employees such as the Third Respondent? I am persuaded by the Municipal Manager's view, supported by the legislation, that unless he has delegated the power in writing to an employee, the employee has no authority to sign.

32.9. I therefore find that the Commissioner committed a gross irregularity when she found that the Applicant had not established a rule that only the Municipal Manager could sign the cession agreements unless he had delegated that responsibility in writing to the employee. He had not done so, and therefore the Employee breached the rule.

33. The double jeopardy challenge

33.1. I agree with the municipality that the employer's reprimand did not constitute "double jeopardy", (punishment of an employee twice for the same offence) and the commissioner erred in that respect. The reprimand did not constitute a species of disciplinary sanction, but rather an "off the cuff" signal of disapproval.

33.2. I therefore agree with the municipality that the commissioner erred in this respect.

34. The inconsistency challenge

34.1. I also agree with the employer's ground of review that the commissioner erred by finding an inconsistent application of sanction because different employees were not disciplined for signing cession agreements.

34.2. I say so because she failed to consider the evidence that they may have been authorised to do so, and in any event such conduct occurred before the Municipal Manager's time. These are relevant distinguishing factors vitiating a finding of inconsistency.

Analysis and discussion

35. In my view the commissioner erred by finding that the employee had not proved a rule, (and by implication had not proved a breach of the rule). With a proper analysis of the law and the evidence before her, the commissioner should have found that there was a rule, and that the employee was in breach thereof.

36. I am mindful though of the mitigatory elements which impact on the appropriacy of the sanction of dismissal imposed by the employer some 3 years ago. Those are that, the employee had signed such agreements for 5 years whilst employed at the Mopani District Municipality (with no challenge to his authority to do so); that there was a practice at the Municipality before Mr Magabane joined that senior employees were doing the same thing, and importantly that the Municipal

Manager knew , or reasonably should have known when he signed the payment certificate that the employee was signing the cession agreements, and failed to intervene much earlier.

37. I agree with Ms Mafa Chali's comment,
"It is therefore questionable that the MM would authorise payments if the official that signed the cession agreements did not have authority to bind the MM. Surely the MM should have seen that the cession agreements do not have his signature and rejected them outright when the documents were presented to him for payment approval"[16]

38. Finally, the employee stopped signing, when he was reprimanded by the Municipal Manager for doing so. He therefore no longer posed a financial risk to the municipality.

39. In summary I agree with the Municipality that the commissioner erred by finding that there was no rule that Mr Machubene could not sign session agreements. I also agree that the commissioner should have found that Mr Machubene had breached the rule. I do not however reach the conclusion that the commissioner's finding of a substantively unfair dismissal is reviewable and should be set aside, because there are four persuasive mitigatory factors to sustain the finding that the dismissal was unfair. Those factors are (1) the Municipal Manager's knowledge that the employee had signed the cession agreements without apparent authority at least 11 times without intervening; (2) that previous employees had done so without any sanction; (3) that the employee stopped signing when the Municipal Manager reprimanded him, and (4) finally the employee's evidence of a prior practice where he had previously worked.

40. Although I agree with the municipality's attack on the double jeopardy and inconsistency point, I do not find that those two points can sustain an overall finding that the award falls outside of the boundaries of reasonableness, especially noting the mitigatory factors set out above.

[16] Paragraph 125 of the award.

41. The test for review is set out in section 145 (2) of the LRA – an arbitration award may be set aside of the commissioner committed misconduct, a gross irregularity or exceeded his or her powers, or if the award was irregularly obtained. The test is infused with the standard of reasonableness, established by the Constitutional Court *in Sidumo and another v Rustenburg Platinum Mines*.[17] The standard is expressed in the negative, "*Is the decision reached by the commissioner one that a reasonable decision maker could not reach*?"

42. Over the years, various courts have espoused related principles, and one apposite to the case before us is *Herholdt v Nedbank*.[18] In that case the Supreme Court of Appeal stated

"*A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii) the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. <u>A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside</u> but are only a consequence if their effect is to render the outcome unreasonable*." (my emphasis)

43. I mention this case because it is authority for the proposition that if an award can reasonably be sustained from relevant evidence before the commissioner, which may not have been considered or given the weight that it should have by that commissioner, and the outcome of the award would have remained the same (assuming the consideration of that evidence), then the Court may not set aside the award on review.

[17] CCT 85 / 06

[18] (2013) 34 ILJ 2795 (SCA)

44. Without belabouring the point, it may be expressed as follows: if an arbitrator bases an award on evidence “A”, “B” and “C” and reaches outcome “Z”, yet later, reasons “A”, “B” and “C” are shown during a review to be unpersuasive, but within the record there is evidence “D” and “E” which is material and relevant, and would lead to the same outcome “Z”, then the award may not be set aside because evidence “D” and “E” sustains the same outcome. The converse is true, if there is no other material and relevant evidence to sustain the award, then it may be reviewed and set aside.

45. In my view the four mitigatory factors explained above (and to use the analogy of evidence “D” and “E”), are sufficient to render the dismissal unfair and to sustain the commissioner’s finding on substantive unfairness.

The remedy

46. The commissioner found that the dismissal of Mr Machubene was substantively and procedurally unfair and ordered his reinstatement to the date of dismissal (10 March 2021) with backpay of R300 000.

47. The commissioner handed down her award in August 2021. The employee’s fixed term contract was scheduled to terminate on 31 October 2023. But for the review, the award would have been capable of fulfilment. That is no longer the case.

48. According to section 193(1) and (2)(c) of the LRA, if there is a finding of substantive unfairness then reinstatement is the primary remedy, unless it would not be reasonably practicable. That is the current situation. The appropriate remedy instead would be compensation. In light of the 6 months back pay which the employee was entitled to, and noting the loss of employment until October 2023, I am inclined to grant the maximum compensation of 12 months as contemplated in section 194(1) of the LRA.

49. Accordingly, I make the following order:

Order

50. The arbitration award under CCMA Case number LP 2542/ 21 is reviewed and set aside in the following respect:

50.1. The finding of procedurally unfairness is set aside.

50.2. The order of reinstatement is set aside.

50.3. The order of backpay of R300 000 is set aside.

51. The arbitration award is substituted as follows:

51.1. The dismissal was procedurally fair but substantively unfair.

51.2. The employer is to pay the employee maximum compensation of 12 months remuneration of R600 000.

51.3. Payment to be made by no later than 20 March 2024.

52. There is no order as to costs.

D Norton

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv Ramoshaba
Instructed by:	Modjadji Raphesu Attorneys
For the Respondent:	Adv Grundlingh
Instructed by:	Joubert & May Attorneys