

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2132/20

In the matter between:

WORKING ON FIRE (PTY) LTD

Applicant

and

NUMSA obo JOHNSON MAFISA

First Respondent

COMMISSIONER MOLOI N.O.

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 10 January 2024

Delivered: 06 March 2024

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 06 March 2024.)

JUDGMENT

BUIRSKI, AJ

Introduction

- [1] This is a very peculiar tale. It begins with an employee, the First Respondent, Johnson Mafisa (Mafisa) who, for reasons which are neither disclosed nor fully comprehensible, decided to challenge the authority of his employer, the Applicant, in the most open, confrontational and insubordinate way. Mafisa, unhappy with the internal appointment of a certain regional manager, one Mr Lazola Banzana, wrote an email which, according to evidence led at the arbitration hearing, amounted effectively to an open letter addressed to all staff of the Applicant, senior management and new appointees alike. In this email, Mafisa complained about the appointment of Mr Banzana and in so doing, he questioned the judgment and integrity of both senior management and Mr Banzana. Management of the Applicant was naturally unhappy about receiving this letter.
- [2] The Applicant, instead of dealing with the matter appropriately, decided to dismiss Mafisa *in absentia* and without a hearing and it turned out, in the absence of any supporting evidence. Mafisa, unhappy about his dismissal referred this matter to the Commission for Conciliation, Mediation and Arbitration (CCMA). The matter came before the Second Respondent (Commissioner) who, on 24 November 2020, issued an award in which he not surprisingly found that the dismissal of Mafisa was both procedurally and substantively unfair and who, in so doing, ordered the Applicant to reinstate Mafisa with full retrospective effect including backpay in an amount of R244 633.99. In passing, the Commissioner noted that *“to further compound the problem for the Respondent [Applicant] in this matter it was hinted ... that [among] the four people who were involved in deciding that the Applicant [Mafisa] be dismissed was... Banzana, the person who was at the centre of the charge...”*
- [3] This is the arbitration award which the Applicant asks me to review and set aside.
- [4] For reasons which should be already apparent, I am unable to do so. My full reasons, however, follow.

Background

- [5] The Applicant, Working on Fire (Pty) Ltd, is a subsidiary of Kishungu Holdings and is a private firefighting company. It has bases in all of South Africa's provinces. The Applicant, pursuant to a tender process, assists the Department of Environmental Affairs in firefighting programmes. The Working on Fire programme is owned by the Department of Environmental Affairs.
- [6] Mafisa, the employee has already been referred to. He worked at the Applicant's base in Nelspruit, Mpumalanga as a Regional Manager.
- [7] The facts of this matter, which are set out in the paragraphs below, are gleaned from my reading of the pleadings and the arbitration record, including the award of the Commissioner which makes a fair summary of those essential facts.
- [8] The Commissioner in his award begins his analysis of evidence by noting that it is common cause that three charges of misconduct were brought by the Applicant against Mafisa and that these were triggered by the already mentioned email which Mafisa wrote to all staff on 11 October 2019. In the email, written in response to the Applicant's announcement of new appointments to various positions in the workplace, Mafisa disputed the legitimacy and wisdom of the appointment of Mr Banzana who had been appointed as General Manager for the Free State province.
- [9] Evidence as to the contents of this email was adduced in the arbitration hearing before the Commissioner, and this evidence need not be dwelt on here, save to state that the email amounts to a strident attack on the management competence of both senior management at Applicant and Mr Banzana, the newly appointed General Manager for the Free State.
- [10] If the Applicant had based its decision to dismiss on the contents of this letter and on the fact that Mafisa published this letter to the Applicant's entire workforce, evidence which, it is reiterated, was for the first time adduced in the arbitration, then the Applicant, in terms of common law, might have had reason to justify its statement made in Mafisa's letter of termination dated 27 November 2019 that "... *Working on Fire has decided to terminate your services with immediate effect... the reason being that the trust relationship*

has irretrievably broken down and that your continued employment has become intolerable.”¹

- [11] That, however, is not what happened in this matter.
- [12] Instead what happened was the following. On the very same day that he wrote this letter, 11 October 2019, Mafisa was suspended. The Applicant later summoned him to a disciplinary hearing on 1 November 2019 per a disciplinary hearing notice that sets out details of three charges levelled against him, including one with respect to the writing of the email referred to above and where it was indicated that Mafisa’s conduct in writing the email was a direct challenge to the authority of both senior management and that of Mr Banzana. Mafisa advised the Applicant that he was unable to attend this hearing as he had been booked off sick. Another hearing was duly arranged for 27 – 29 November 2019 and the Applicant on 25 November 2019 attempted to deliver the notice of this revised hearing to Mafisa personally but was unable to do so. The Commissioner refers to an endorsement note penned at the foot of the revised disciplinary hearing notice which read “*we didn’t find Mafisa at his house*” and notes that according to Mafisa’s wife, Mafisa had been admitted to Corona Hospital since 18 November 2019.
- [13] On the first appointed day of the new hearing, 27 November 2019, Mafisa not surprisingly did not pitch up.
- [14] The consequence was that the Applicant by its free admission as contained in the founding papers in this review application determined that “*on the 27 November 2019 the First Respondent [be] dismissed without a hearing and in his absence*”.
- [15] The full significance of this admission cannot be underplayed.
- [16] The first implication is for procedural fairness.
- [17] The Commissioner found this dismissal was procedurally unfair. I agree.

Analysis

¹ cf *Council for Scientific and Industrial Research v Fijen* 1996 (2) SA 1 (A) at 9H.

- [18] The Commissioner expressly approached the fairness of the dismissal against the backdrop of section 188 of the Labour Relations Act² (LRA) which section in relevant part provides that “a dismissal... is unfair if the employer fails to prove (a) that the reason for dismissal is a fair reason - (i) related to the employee’s conduct ... and (b) that the dismissal was effected in accordance with a fair procedure”. The Commissioner significantly added “furthermore section 188 (2) of the LRA enjoins me as the Commissioner seized with this dispute to take into account any relevant code of good practice issued in terms of the LRA”.

Procedural fairness

- [19] The relevant Code of Good Practice; Dismissal³ provides at items 4(1) and 4(4) that “normally the employer should conduct an investigation to determine whether there are grounds for dismissal” and that it is only “in exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, [that] the employer may dispense with a pre-dismissal procedure.”
- [20] No exceptional circumstances were present here and the Commissioner cannot be faulted for reasoning that procedural fairness, at a minimum, required that further notice should have been given to Mafisa in this instance. I cannot fault his following reasoning, in particular, at paragraph 38 of the arbitration award wherein he stated that:

[38] Even though the Respondent had set the matter down for three days namely from 27 – 29 November 2019, they did not keep to their own dates...A reasonable employer in the shoes of the Respondent would have phoned the Hospital in question to find out whether or not he was hospitalised... A simple telephone call to Corona Hospital would have been enough for the Respondent to satisfy itself whether or not the Applicant was indeed still hospitalised... It was procedurally unfair on the part of the Respondent to have dismissed the Applicant on the very first day of a hearing that had been set down for three days

² Act 66 of 1995, as amended.

³ Schedule 8 of the LRA.

without having taken any steps to ensure firstly that the Applicant was aware of the date of the hearing and secondly without having satisfied itself whether or not the Applicant was hospitalized.’

Substantive fairness

- [21] The second implication of the Applicant’s admission as to the nature of this dismissal, (one *in absentia* and without a hearing), lies with respect to substantive fairness.
- [22] By review ground one, Applicant alleges that the Commissioner “*placed inordinate weight on the fact that the Applicant did not conduct a hearing*”, and seemingly thereby suggests that the Commissioner ought to have recognized that its’ manifest failings in procedure notwithstanding, the Applicant, from the perspective of substantive fairness, nonetheless continued to have good reason to dismiss.
- [23] The Applicant is wrong. Quite apart from the fact that it is of course well known that procedural unfairness may result in substantive unfairness⁴, there is no warrant for such conclusion on the facts herein.
- [24] The common cause fact that Mafisa was dismissed *in absentia* and in the absence of a disciplinary hearing, need not necessarily or inevitably have meant that Mafisa was to be dismissed in the absence of evidence. Ignoring for the moment the question of procedural unfairness, had there been a hearing *in absentia* that was designed to establish “*that the reason for dismissal is a fair reason related to the employee’s conduct*”⁵, then one would have expected that the Applicant, at a minimum, would have been able to produce a record that was designed to show and prove that the reason for dismissal was supported by facts and evidence.
- [25] The Applicant, however, could not do so. This issue was indeed clarified and answered to the satisfaction of the Commissioner during the arbitration. The Commissioner recalled the Applicant’s primary witness Mr Nemadzivhanani,

⁴ See *Woolworths (Pty) Ltd v South Africa Commercial, Catering and Allied Workers Union and others* [2017] 12 BLLR 1217 (LAC) at para [22].

⁵ See section 188 (1)(a)(i) of the LRA.

(the latter of whom is also the deponent to its affidavits in this review application), and posed to him certain questions designed to establish whether the Applicant possessed minutes of the default hearing that took place in Mafisa's absence. Mr Nemadzivhanani in answer made it quite clear that no such minutes existed. He answered unequivocally and repeatedly that *"there was no hearing that I can think of... there was no hearing that I can refer to"*.

[26] This unequivocal admission by Mr Nemadzivhanani disposes of both the so-called first and third grounds of review – namely that the Commissioner failed to apply his mind to the material facts before him and that the Commissioner misconstrued the evidence of Nemadzivhanani and that somehow the Applicant, when dismissing Mafisa on 27 November 2019, did so with *"evidence ... on ... hand"*. The Applicant had no such evidence on hand and the Commissioner did not misconstrue any evidence in this regard. Even if it be assumed as correct that the Applicant, at the time of the dismissal, possessed both a copy of the charge sheet and the offending letter referred to above, there is no suggestion that the decision to dismiss was taken after the hearing of any evidence or testimony either on this issue or at all. There is, in short, no evidence to suggest that the allegation made in the letter of dismissal that *"the trust relationship has irretrievably broken down and that your continued employment has become intolerable"* was substantiated by any evidence led at the time of dismissal. It is important to note that it has long been trite that a dismissal based on a breakdown in the trust relationship and made in the absence of evidence is unfair and inappropriate.⁶

[27] A reading of the arbitration record thus proves that when the Applicant dismissed Mafisa as it did on 27 November 2019, it not only dismissed him in his absence and without a hearing, but that it did so in the absence of any supporting evidence.

[28] The impact of this failure to lead evidence was not incorrectly noted by the Commissioner who recognized that this failure was such as to render this

⁶ *Edcon Ltd v Pillemer NO and others* [2009] ZASCA 135; [2010] 1 BLLR 1 (SCA) (*Edcon*) at paras [22] – [23].

dismissal substantively unfair. Again I can do no better than quote the award of Commissioner:

‘Whoever decided that the Applicant should be dismissed without having heard any evidence that was needed to be adduced that the Applicant indeed had committed the offences that he was accused of. The way that the Respondent handled this aspect of the dispute supports the inference that the dismissal of the Applicant was a foregone conclusion by the time the charges were brought against him. The argument of the Respondent that the trust relationship was broken beyond repair has no foundation in the evidence as no evidence whatsoever was led at the hearing. It must not be forgotten that the fairness or otherwise of a dismissal is determined on the basis of the reasons/facts relied on by the employer at the time of dismissal – *Fidelity Cash Management Service v CCMA and others* [200] 3 BLLR 197 (LAC).’

- [29] In the premises, the Commissioner did not err in finding the dismissal to be substantively unfair. The record shows that the Commissioner in doing so and in arriving at this conclusion - and contrary to what Applicant alleges in its first ground of review – fully applied his mind to the facts before him.
- [30] It is of course of no assistance to the Applicant to plead, as it does, on the basis of the proposition that the proceedings before the Commissioner are a *de novo* hearing, that the Applicant led evidence in support of all three charges in the arbitration hearing before the Commissioner. This evidence is irrelevant. It was not led at the disciplinary hearing. The Commissioner was accordingly not entitled to determine the fairness of Mafisa’s dismissal on the basis of reasons for the dismissal, upon which the Applicant did not rely at the time of his dismissal.⁷

A further ground of unfairness

⁷ cf *Palluci Home Depot (Pty) Ltd v Herskowitz and others* [2014] ZALAC 81; [2015] 5 BLLR 484 (LAC) at para [46].

- [31] In further support of the Commissioner's central finding of unfairness in the decision to dismiss, the Commissioner, towards the end of his award, observed that it appears that Mr Banzana was amongst the panel of four people who were involved in deciding on Mafisa's fate and dismissal. Banzana was of course the very person whose competency as a manager Mafisa was said to have challenged in his email of 11 October 2024 and who was as such centrally involved in the impugned conduct. When this matter was argued before me this particular aspect of the matter was confirmed by counsel and it is, in any event, supported by passages from the record.
- [32] The Applicant's breach of the *nemo iudex in propria causa* rule is thus an additional and crucial reason why Mafisa's dismissal was found to be unfair and again the Commissioner's reasoning cannot be questioned in this regard. This rule, one of the fundamental principles of natural justice, requires that an affected party must be heard by an impartial and unbiased tribunal and that a judge or decision-maker cannot be judge in his own cause. It is trite that a breach of this rule vitiates the entire proceedings, with the result the proceedings will be quashed and set aside.⁸

Remaining grounds of review

- [33] It remains to observe that the only outstanding grounds of review are of no moment in this matter.
- [34] Firstly, the alleged failure on the part of the Commissioner to provide guidance to the Applicant is a ground that not only appears weak in principle but when analysed, is neither valid nor relevant. It is alleged by the Applicant that the Commissioner at the arbitration failed to guide the Applicant on the need to lead evidence on charge 3. It should by now be apparent that any evidence adduced by the Applicant at the arbitration to substantiate the charges on which Mafisa was allegedly dismissed was irrelevant. As already noted, as Mafisa's alleged culpability on these charges did not constitute the reason for

⁸ See generally *Van Huysteen v Minister of Environmental Affairs & Tourism* 1996 (1) SA 283 (C) 304I-305C; *SACCAWU and others v President of the Industrial Tribunal and Another* [2001] 2 All SA 117 (A) at para [10]; *Lesapo v Northwest Agricultural Bank and another* 1999 (10) BCLR 1195 (B) at 1201; *Brink v Baston, Diedericks and Horak* NN. O 1942 TPD 127 at 132, see also *Council of Review, SADF & ors v Mönnig & others* 1992 (3) SA 482 (A) 495A-D

his dismissal, the Commissioner was quite simply not entitled to determine the fairness of Mafisa's dismissal on the basis of these reasons which were not advanced at the time of dismissing the Mafisa. To reiterate, the evidence before the Commissioner discloses that the Applicant dismissed Mafisa without reason.

[35] Secondly and in the context of this matter, the alleged tolerance by the Commissioner of leading questions being posed by Mafisa's legal representative to Mafisa when adducing evidence, is at best a blemish or fault in process, which even if true, could not have any impact on the outcome of this matter.⁹

Conclusion

[36] In all the circumstances, this award is not one that a reasonable decision-maker could not reach on the material before him,¹⁰ and this review application thus falls to be dismissed.

[37] In the premises, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

P Buirski

Acting Judge of the Labour Court of South Africa

⁹ *Head of the Department of Education v Mofokeng and others* [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at paras [30] – [33].

¹⁰ *Sidumo & another v Rustenburg Platinum Mines & others* 2008 (2) SA 24 (CC) at para [110]; *Edcon supra* at [23].

Appearances:

For the Applicant: Tamsanqa Mila of Cliffe Dekker Hofmeyr Inc

For the Respondent: Kwezi Mdladlamba of NUMSA

LABOUR COURT