

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case Number: JA02/02

In the matter between:

HIGHVELD DISTRICT COUNCIL

Appellant

and

THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

First Respondent

RICHARD BYRNE

Second Respondent

LEON LLOYD

Third Respondent

JUDGMENT

Du Plessis AJA:

- 1] The third respondent, a civil engineer, was employed by the appellant as its Acting Director: Engineering. The employment relationship was governed by a collective agreement between employers' organisations in the Local Government sector and the SA Association of Municipal Employees. (The collective agreement)

- 2] Following a disciplinary procedure, the appellant dismissed the third respondent on 8 January 1998. The third respondent noted an internal appeal which was unsuccessful. Thereafter a dispute concerning the fairness of the dismissal was referred to arbitration under the auspices of the first respondent. The second respondent was the arbitrator. It is convenient to refer to the second respondent as “the arbitrator”. It will not be necessary to make any further reference in this judgment to the first respondent and I shall refer to the third respondent as “the respondent”.
- 3] In the arbitration the respondent (who was the applicant in the arbitration) contended that his dismissal was both procedurally and substantively unfair. The arbitrator held that it was procedurally and substantively fair. As regards the substantive fairness, he held that the respondent was guilty of engaging in remunerative work outside his employer’s services without first requesting or receiving the employer’s permission. The arbitrator also held that the respondent wilfully acted in a way detrimental to the employer and/or its discipline and/or order by considering and/or approving in his official capacity work which he did privately.
- 4] The respondent applied to the Labour Court to review and set aside the arbitrator’s award. He contended that the arbitrator had erred in not finding that his dismissal was both procedurally and substantively unfair.

- 5] The Labour Court upheld the arbitrator's finding that the respondent's dismissal was substantively fair on the grounds set out above. The Court held however that the dismissal was procedurally unfair and that the arbitrator committed a reviewable error when he held to the contrary. Accordingly, the Labour Court set aside the arbitrator's award and substituted it with an order that the dismissal was procedurally unfair and that the appellant pay to the respondent compensation in an amount equivalent to twelve months remuneration. The appellant now appeals against the Labour Court's judgment and order.
- 6] There is no cross appeal against the Labour Court's finding that the dismissal was substantively fair. The first issue before us therefore is whether the arbitrator's finding that the dismissal was procedurally fair should have been reviewed and set aside. The second issue before us is whether the Labour Court was correct when it ordered the appellant to pay compensation to the respondent. The second issue will arise only if we find that the arbitrator's finding that the dismissal was procedurally fair must be reviewed and set aside. I deal first with question whether the dismissal was procedurally fair or not.

The facts.

- 7] The disciplinary proceedings against the respondent came about as follows: An

unidentified firm of consulting engineers complained of irregularities in the appellants engineering department. The appellant's chief executive officer instructed a firm of attorneys, Brandmuller-Taljaard, to investigate the matter. He also suspended the respondent from his duties pending the investigation. The attorneys conducted the investigation and furnished the appellant with a comprehensive written report in which they recommended that a disciplinary inquiry be held in which the respondent "must be given the opportunity to respond to" the allegations against him in which the attorneys found substance.

- 8] The chief executive officer informed the respondent by letter that a disciplinary hearing was to be held against him. Attached to the letter was a copy of the attorneys' report. Documents allegedly substantiating the charges against the respondent and referred to in the report were also made available to the respondent. At the disciplinary hearing that followed the respondent, who was then represented by a union official, received a written charge sheet. It is, in view of the arguments presented to us, unnecessary to deal with the actual proceedings in detail. Suffice it to say that evidence was presented in the presence of the respondent and his representative who was afforded the opportunity to cross-examine witnesses and to present evidence.
- 9] The disciplinary committee found the respondent guilty of misconduct and recommended that he be dismissed. He lodged an appeal in terms of the disciplinary

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procedure. The appeal was heard by an appeal committee that dismissed the appeal. It is common cause that the chairperson of the appeal committee did not appoint a prosecutor. The respondent was however represented at the appeal hearing by the same union official who was afforded a full opportunity to address the appeal committee.

The respondent's contentions

- 10] The collective agreement referred to in paragraph 1 above makes provision for a disciplinary procedure. Clause 10.2.2.1 thereof provides:

“Any accusation against an employee shall be brought in writing before the head of department concerned or his authorised representative by the person making the accusation”.

The respondent contended before the arbitrator, before the Labour Court and before this Court, that clause 10.2.2.1 was not complied with in that the disciplinary hearing originated from an anonymous complaint which was not in writing. That, the respondent contended, constituted a procedural unfairness.

- 11] In the second place the respondent contended that the procedure adopted by the appeal committee was procedurally unfair because clause 10.2.2.9.15.3 of the collective agreement was not complied with. The clause provides:

“The chairman of an appeal committee shall appoint a person who shall act as

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prosecutor during the hearing and shall advise such prosecutor, the employee charged and his trade union representative, as the case may be, in writing, of the date, time and place of the hearing, which shall take place within 10 working days of the date on which the appeal is received by the town clerk or his authorised representative”.

I have pointed out that it is common cause that no prosecutor was appointed.

The findings of the arbitrator and of the Labour Court.

- 12] The arbitrator held that the disciplinary procedure provided for in the collective agreement was applicable to the respondent’s disciplinary hearing. He held however that the provisions of the collective agreement were not breached “such as to cause (him) .. to conclude that” the procedure was unfair.
- 13] The Labour Court held that the collective agreement is peremptory in its prescription of the disciplinary procedures. The procedure followed in the disciplinary hearing of the respondent was not in accordance with the prescribed procedure in both the respects set out above. From that finding followed the Labour Court’s finding that the respondent’s dismissal was procedurally unfair.

Consideration of the issues

- 14] The relevant issue referred to the arbitrator was whether the respondent’s dismissal was procedurally fair. Put differently, the respondent sought to vindicate his right in terms of s185 of the Labour Relations Act, 66 of 1995 (“The Act”) not to be unfairly

dismissed. More specifically the respondent sought to vindicate his right in terms of section 188(1)(b) of the Act to be dismissed only in accordance with a fair procedure. It is a right separate and distinct from the respondent's contractual rights in terms of the collective agreement.

- 15] Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will ordinarily go a long way towards proving that the procedure is fair as contemplated in s188(1)(b). The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed was unfair. Mr Venter for the respondent referred us to the arbitration award in *Ned v Department of Social Services & Population Development* [2001] 22 ILJ 1039 (BCA) where (at 1044B) the arbitrator said: **“The failure to honour an obligation expressly undertaken, is per se unfair conduct”**. I must point out that an arbitrator's award does not constitute an authoritative precedent. In any event, read in its full context, especially in the context of what is said on page 1040 of the report, I do not think that the arbitrator in that case was stating a general proposition that failure to comply with an agreed disciplinary procedure in itself constitutes an unfair procedure in breach of the Act. If however Mr Venter was correct and that is what the arbitrator said in the *Ned* case, I cannot agree. When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all

the circumstances the procedure was fair. (*Leonard Dingler (Pty) Ltd v Ngwenya* [1999] 20 ILJ 1711 (LAC))

- 16] It does not follow from this conclusion that a contractual procedure does not give rise to contractual rights that a contracting party can enforce in the appropriate forum and in the appropriate manner. In this case however we are not called upon to adjudicate a contractual right, but a statutory right to a dismissal that is procedurally fair.
- 17] I assume without finding that the appellant did not comply with the provisions of clause 10.2.2.1. The respondent was nevertheless fully informed of all the allegations against him before the disciplinary hearing commenced. Mr Venter submitted that the respondent was disadvantaged because he did not know the identity of the initial complainant. The respondent could, so it was argued, have called the complainant to testify had he known the identity of the person. Knowledge of the identity of the complainant would, the argument continued, also have enabled the respondent better to investigate the nature of the complaint and to better prepare his defence. The argument has no substance. The respondent was confronted with all the evidence against him during the disciplinary hearing and he had ample opportunity to dispute every piece of evidence that was put before the disciplinary committee. It is on that evidence that he was, correctly as it turned out, found guilty of misconduct. The arbitrator correctly had regard to the procedure actually followed and concluded that it was fair. There is no basis for holding that in doing that he committed a reviewable

error.

- 18] The fact that the chairperson of the appeal committee did not appoint a prosecutor had, as far as the respondent is concerned, no bearing on the fairness of the appeal proceedings. The appeal was heard on the record of the disciplinary hearing and the respondent's representative had a full opportunity, without a prosecutor to oppose him, to make submissions and argue the respondent's case.
- 19] In the result it is concluded that the Labour Court erred in holding that the arbitrator's award should be set aside on any of the bases provided for in section 145 of the Act.
- 20] The parties were agreed that costs should follow the event.

In the result the following order is made:

1 The order of the Labour Court is set aside and the following order is made in its stead:

“The application for review is dismissed with costs”

2 The third respondent is ordered to pay the appellant's costs in the appeal.

B.R. du Plessis

**Acting Judge of the Labour Appeal
Court.**

I agree.

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R.M.M. Zondo

Judge President of the Labour Appeal Court

I agree.

D.M. Davis

Acting Judge of the Labour Appeal Court.

Date of hearing: 21 August 2002

Date of Judgment: 4 October 2002

For appellant: Mr A.P. Brandmuller

Instructed by: Brandmuller-Taljaard

For Respondent: Adv Venter

Instructed by: Van Deventer & Campher