

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

Case No.: JA 64/08

EMALAHLENI MUNICIPALITY

Appellant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION
RONEL DE WET N.O.
PHILLIPUS JEREMIAS STONE**

**First Respondent
Second Respondent
Third Respondent**

JUDGMENT:

DAVIS JA:

Introduction

- [1] This is an appeal against an order of Molahlehi J of 11 March 2008, in terms of which an arbitration award issued by the second respondent who ordered appellant to pay twelve months compensation to third respondent, was reviewed and set aside and substituted with an order for the retrospective reinstatement of the respondent.
- [2] After hearing argument by counsel, this court gave its judgment *ex tempore*. Inexplicably, the operator of the recording machine did not inform the court that the recording device was not operating. Accordingly, and for this reason, the responsibility for which has not been satisfactorily explained by those mandated to operate the recording device, the entire

judgment could not be transcribed. Consequently, it is necessary for this court to reconstruct the judgment which was so delivered.

The facts

- [3] Third respondent was employed by appellant's predecessor, the City Council of Witbank, from 1 May 1981 in the City's engineering department. At the time of the termination of his services, third respondent held the position of assistant city engineer. He appeared before a disciplinary committee, charged, inter alia, with conducting private remunerative work without the permission of his employer. He was found guilty and dismissed as from the 1 March 2000.
- [4] The dispute was heard by second respondent who found that the dismissal was procedurally and substantively unfair. She then decided that the appropriate remedy was to award third respondent compensation in the amount of twelve months salary, being R181 166, 04. Third respondent then brought an application for a review of this award in terms of section 145 of the Labour Relations Act 66 of 1995 ('LRA'), pursuant to of which he sought reinstatement. It appears that neither the appellant nor first nor second respondent opposed the relief and, accordingly, Molahlehi J granted the order so sought. Appellant now approaches this court on appeal with the leave of the court *a quo*. I turn to deal first with the award of second respondent.

The arbitration award

- [5] First respondent was confronted with two essential charges being:
- “1. That you are guilty of contravening clause 10.1.1.12 of the conditions of service in that you engaged in remunerative private work outside of the City Council’s service without the first requesting and receiving the City Council’s permission.
 2. That you are guilty of contravening clause 10.1.1.5 of the conditions of service in that you conducted yourself in a disgraceful improper unbecoming or dishonest manner or in such a manner that the position of trust between employer and employee is impaired.”
- [6] Appellant called four witnesses to substantiate the charges which it had been brought against third respondent.
- [7] Read as a whole, this evidence, at the very least, showed that third respondent admitted to receiving ‘sakkoste’ from a Mr De Lange, pursuant to plans which he had drawn and which were later approved by him. It is also clear from the evidence that, whereas third respondent had once requested permission for the performance of private remunerative work, the permission so granted was valid for one year. It had lapsed by the time of the De Lange transaction.

[8] Significantly, third respondent chose not to testify, such that the evidence generated by appellant's witness was never placed in dispute. Accordingly, the evidence that third respondent had received money from Mr de Lange and that he had drawn plans and then approved them in circumstances where this act did not form part of his official duties was never placed in dispute.

[9] Second respondent was correctly compelled to conclude: 'in the absence of any facts in front of me to suggest that Stone had permission, it is found that, on a balance of probabilities, that the Applicant had permission however such permission expired and was not valid at the time of the incident'. (sic). Furthermore, second respondent was 'satisfied that the respondent proved the second charge as well as one of, the sub charges of the first charge, to wit receiving R200 from De Lange.

[9] Turning to the decision to dismiss third respondent, second respondent said:

"It is found that the decision respondent was not unreasonable that it shocks one senses."

Notwithstanding this conclusion, second respondent went on to find that the rule regarding 'private work' had not been consistently applied by appellant and thus the dismissal of third respondent was substantively unfair. Second respondent also found that there was an element of

procedural unfairness, notwithstanding that there had been no such point taken by third respondent at the disciplinary hearing nor at the appeal committee hearing. The basis for this conclusion was that members of the disciplinary hearing were also members of the executive council which recommended and then approved the dismissal. Further, third respondent was not given a copy of the disciplinary record within the prescribed period and that the recoding machine was defective.

Evaluation

- [10] The approach adopted by second respondent now stands to be interrogated in terms of the test set out by the Constitutional Court in Sidumo v Rustenberg Platinum Mines 2008 (2) BCLR 158 (CC):

“Is a decision reached by the Commission is one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices but also to the right to administrative action which is lawful, reasonable and procedurally fair.” para 110

- [11] In arriving at the mandated reasonable decision, a party, such as second respondent, should, particularly in approaching a dismissal dispute, consider the factors set out by Navsa AJ (as he then was) in Sidumo at para 78 namely, the commissioner must;

- (a) take into account the totality of the circumstances as emerges from the evidence;
- (b) consider the importance of the rule that has been breached;
- (c) consider the reason the employer imposed the sanction of dismissal together with the employee's challenge to this decision;
- (d) the harm caused by the employee's conduct;
- (e) whether additional training or instruction may result in the employee not repeating the misconduct;
- (f) the effect of dismissal on the employee and his or her long service record.

Although Navsa AJ emphasised this was not an exhaustive list, an examination of the manner in which second respondent treated these factors provides considerable guidance as to whether the decision taken was a reasonable one.

- [12] Cognisance should also be taken of the *dictum* of Zondo JP in his explication of the Sidumo approach in Fidelity Cash Management Service v CCMA and others (2008) 29 ILJ 964 (LAC) at para 102:

"In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or in the subsequent assessment of whether or not such decision or finding is one that a

reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision."

Conclusion

- [13] Applying these considerations to the approach adopted by second respondent to the present dispute, it is apparent that the award is manifestly at war with itself. Second respondent concluded, as she was constrained (given that third respondent did not testify at all) that, on the evidence, appellant had discharged the onus, on the probabilities, of proving the contravention of the charges which were so brought. She further concluded that the decision by appellant to dismiss third respondent did not induce any reasonable sense of shock.
- [14] It is inexplicable, having so concluded, that second respondent, without more save for vaguely substantiated statements that a rule may not have been consistently applied, could so conclude that the decision of appellant

to dismiss third respondent was substantively unfair. There was also no evidence to suggest that the initial disciplinary hearing or the appeal hearing had been conducted in a procedurally improper manner, particularly in the light of the approach adopted by third respondent to such hearings.

- [15] Following Zondo JP in Fidelity, *supra*, it is also possible to consider factors which were before second respondent but which were scarcely mentioned: in the award third respondent held a senior position of trust, particularly as a result of his power to approve plans. When an employer at this level of seniority breaches organisational rules for personal profit, however small the profit might have been, and seeks to abuse his official powers and approves plans which he personally had drawn up, this constitutes a serious form of misconduct, going to the very heart of the integrity of an employee who is vested with considerable influence within the organisation.

The court *a quo*'s judgment

- [16] When the applicable law is considered together with the evidence which was placed before second respondent, the approach adopted by second respondent compelled a reasonable decision maker to uphold the decision to dismiss third respondent. Once confronted with a decision, as unsatisfactory as that taken by second respondent, the court *a quo* was

surely obliged to deal with the matter by setting it aside, as being an unreasonable decision. That he did more than simply confirm an incorrect finding, namely the award of compensation in the sum of R181 166, 04 representing the equivalent of twelve months salary, but proceeded to direct the appellant to reinstate the respondent retrospectively to the date of his dismissal, is manifestly incorrect, in that it fails to apply to law as set out in paras 10 – 12 of this judgment.

[16] Having examined the evidence together with the approach adopted thereto by second respondent, the court *a quo* should have applied the approach as set out in Sidumo and found that, on the available evidence, the dismissal was both substantive and procedurally fair.

[17] For these reasons therefore, the following order is made:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and replaced with the following order:
 - 2.1 The dismissal of third respondent was substantively and procedurally fair.

DAVIS JA

JAPPIE JA AND REVELAS AJA agreed

