



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA1/2013

In the matter between:

DEPARTMENT OF FINANCE

AND ECONOMIC DEVELOPMENT

(THE PROVINCE OF GAUTENG)

Appellant

and

TRULY MOSOME

First Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL (GPSSBC)

Second Respondent

ZARINA WALELE

Third Respondent

Heard: 17 September 2013

Delivered: 19 September 2014

Summary: Section 193(2) of the LRA, Employee dismissed for insubordination. First arbitrator finding employee unfairly dismissed but order compensation. Review of arbitration award. Court a quo setting aside arbitration award and remitting to bargaining council for further evidence to be adduced on whether to reinstate or compensate employee. Second arbitrator finding employment relationship had irretrievably broken down and confirming compensation – Review of second arbitration awards. Court a quo setting aside award and reinstating employee. Appeal court a quo misconstruing first review judgment – First reviewing court setting aside award only for determination of the appropriate remedy. – Evidence

showing employment relationship irretrievably broken down. Reinstatement reasonably impracticable. Arbitrator his mind to the evidence – Appeal upheld – court a quo’s judgment set aside.

Coram: Tlaletsi DJP, Musi and Mokgoatlheng AJJA

JUDGMENT

MOKGOATLHENG AJA

- [1] This is an appeal against the judgment and order of the Labour Court (Molahlehi J) in terms whereof it reviewed and set aside the third respondent’s (the second arbitrator’s) award made on 7 May 2009 wherein she held that the reinstatement of the first respondent pursuant to *Section* 193(2) of the Labour Relations Act 66 of 1995 (The Act) was incompetent because the employment relationship between the appellant and the first respondent had irretrievably broken and was rendered intolerable as envisaged in *Section* 193(2)(b). The *court-a-quo* reinstated the first respondent, ordered that a warning be annotated in her employment record, and awarded her seven months compensation in the amount of R101, 423.00.
- [2] The *court-a-quo* in setting aside the second arbitrator’s award found that the second arbitrator had misdirected herself because she had failed to take into account:
- (i) the first arbitrator’s finding that the first respondent’s dismissal was unfair;
 - (ii) that the first respondent’s letter to her supervisor (Ms Kekana) was in reaction to the latter’s letter in which she had unnecessarily used provocative language in addressing differences she had with the first respondent arising from their employment relationship; and
 - (iii) that the first respondent’s letter had to be considered against the background that there was an employment relationship conflict between her and Ms Kekana.

The factual matrix

- [3] The first respondent was employed by the appellant as an advisor responsible for educational projects. Ms Kekana was her immediate superior and supervisor. It was apparent that the employment relationship between the first respondent and Ms Kekana was strained and not cordial as evidenced by the correspondence exchanged between them.
- [4] Ms Kekana in her letter dated 8 July 2004 accused the first respondent of lacking initiative in the conduct of her portfolio. She contended that the first respondent was uncooperative and guilty of negative criticism to her initiatives without offering any proactive input. She accused the first respondent of being absent from her office for two days without a valid reason and that she had failed to attend a scheduled meeting. She requested the first respondent to attend a meeting on 8 July 2004 at 13.00 hours in her office to discuss a planned project. She also invited the first respondent to communicate any suggestions to her in connection therewith.
- [5] The first respondent's response in her letter dated 8 July 2004 to Ms Kekana's letter resulted in the appellant charging her with the misconduct of insubordination. For the purposes of understanding the gravity of the insubordination charge, it is necessary to quote verbatim the salient features of the said letter:

'Letter from T Mosome to E Kekana DD Consumer Affairs

d/d 08.07.2004

To: Eva Kekana DD Consumer Affairs

CC: Fati Manamela Acting CD: Consumer Affairs

From: M.T. Mosome

Subject: Your Letter Dated 8th JULY 2004

It's true that we spoke about Women's Month, but nothing concrete came from that discussion because it was a by the way discussion not unless you took it further with your colleague that you mentioned in your memo.

The Alex issue that you are trying so hard to defend yourself with on that day we both agree that we will meet even if I was going out. In my opinion you do education projects not because I'm making excuses if I have to do them, but because your post I can imagine will be so empty and will no warrant that level you are in at present.

You are an administrator responsible for administration of the office checking whether our equipment and other necessary things that make an office effective are in place. If you ask me whether tis post suits this level I doubt it. Some of my colleagues applied for that post and they had the qualifications, experience and the expertise to execute those duties. You were five this post but from day one like everybody I wondered how did you get that post.

Let me remind you that before you came to this department, if you can check with your supervisor projects were done and I was part and parcel of those who did them. Stop lecturing me about my responsibilities and the fact that I have signed a performance contract because if I'm not doing what I'm supposed to do in terms of that contract, you know what to do.

Ever since you came to this department you have been bugging me about my whereabouts which I'm surprised as you have important things to do and not sit around waiting for me. I'm not a schoolgirl for haves sake and remember this is not a high school where the principal will always want to find out where are the pupils, but a department where adults employee's are entrusted with their work and if they don't people like you know what to do.

As for being a poisonous, critic and destroying the unit I have no comment because I don't know to which unit you are referring to. I'm here to do my work and not for glory, and if this is what you have observed since working with me, that is unfortunate and I'm wondering what are you going to do about it.

If there is truth in your statement that I make excuses when projects have to be done go ahead and do them because you seem to be the best person who does that well, I wonder why do you need my inputs. I hope you get audience this year unlike what happened last year where you ended up asking staff to bring a guest because of the money spend to hire venue when there was no audience.

I won't be available for your meeting Tuesday 08 July 2004 at 13:00 I have other important things to do. Besides doing the book that you are referring to in the

memo, I'm busy with the project that I'm involved with the Inspectors. Go ahead and implement the Women's Month project I know you are an expert (jack of all trade) I mean.

I wonder where do you get so much time to write these stupid letters. Today Truly is fighting with everybody, tomorrow she does not tell you her whereabouts the next day she is poisonous, criticise without solution, she will divide your unit when is this nonsense going to stop because I am sick of it.

Regards

Mosome M.T

2004.07/12.'

- [6] Consequent to the above quoted letter, a disciplinary enquiry was convened, whereat the first respondent was among others charged with the misconduct of insubordination in: *"displaying gross insubordinate behaviour towards Ms Kekana (her supervisor) by using unacceptable language that demonstrated disrespect by saying to her supervisor that she must be stupid, she must stop calling her at home, (when she was contacted while she was supposed to be on duty), also telling her supervisor does not deserve the post she holds."*
- [7] The third respondent was found guilty of 3 charges including the offence of insubordination at the disciplinary enquiry, and was dismissed. She referred the dispute to the second respondent for conciliation. On failure to resolve the dispute, the second respondent appointed the first arbitrator to arbitrate the dispute.
- [8] On 9 June 2009 the first arbitrator found the first respondent guilty of insubordination but found that her dismissal was substantively unfair. The first arbitrator also found that the employment relationship between the appellant and the third respondent had irretrievably broken down with no prospects of a reconciliation. As a consequence the first arbitrator did not order the reinstate merit of the first respondent, he instead ordered the appellant to pay her seven months compensation in the amount of R101, 423.00.
- [9] The first respondent took the first arbitrator's award on review. On 24 July 2008 Judge Cele set aside the first arbitrator's award only in respect of the relief granted.

The Learned Judge remitted the matter to the second respondent to allow further evidence to be led regarding whether the first respondent should be reinstated or not as envisaged in terms of Section 193(2). Further the Learned Judge ordered the first respondent to refund the amount of R101, 423.00 she received in terms of the first arbitrator's award to the second respondent before 31 August 2008.

- [10] Judge Cele's order indicates that he was satisfied that the first respondent was properly found guilty of insubordination but was not satisfied with the cogency of the evidence which predicated her non-reinstatement. The Learned Judge in setting aside the award only with regard to the first arbitrator's relief, shows that he was of the view that the evidence adduced at the first arbitration as envisaged in Section 193(2) was insufficient to have enabled the first arbitrator to properly and judiciously exercise his discretion as required by Section 193(2). Consequently, because the Learned Judge elected not to exercise his discretion pursuant to Section 193(1), he ordered the hearing of further evidence by the second respondent regarding this exigency, the latter in turn appointed third respondent as the second arbitrator to hear such evidence pursuant to Section 193(2).
- [11] Judge Cele's order is predicated on the basis that because the first arbitrator's award for compensation is not rationally justifiable having regard to the paucity of the evidential material before him, the latter could not have reasonably and properly exercised his discretion pursuant to Section 193(2) in order to judiciously arrive at the decision that the first respondent should not be reinstated but should be compensated.
- [12] In my view, Judge Cele's order regarding the hearing of further evidence before the second arbitrator pursuant to Section 193(2) cannot be interpreted as an order to enable the second arbitrator to hear the adducement of further evidence which should obligate the second arbitrator to order the reinstatement of the first respondent as the *court-a-quo* seems to have found. Judge Cele's order decreed that the second respondent should hold a *de novo* hearing for the consideration of evidence to enable the second arbitrator to have sufficient cogent evidence before her to properly exercise her discretion as envisaged in Section 193(2).

- [13] The conclusion regarding Judge Cele's order for a *de novo* hearing is borne out by the fact that the evidence of Charles Morolo who testified in the first arbitration, but did not testify in the second arbitration, his evidence in the first arbitration was not considered by the second arbitrator in the exercise of her discretion pursuant to **Section 193(2)** in making her award. The second arbitrator only considered the evidence of Ms Kekana, Fati Manamela and the first respondent whose evidence was led at the second arbitration in making her award.
- [14] The first respondent took the second arbitrator's award on review. In my view, having regard to the preceding analysis the *court-a-quo* erred in interpreting Judge Cele's order that he, "*reviewed the first arbitrator's award to the extent that it provided for the remedy for compensation, that in other words, the award was not reviewed and set aside insofar as the substantive unfairness of the dismissal was concerned, consequently the second arbitrator was obliged to order the reinstatement of the first respondent.*" (my emphasis)
- [15] The *court-a-quo* also erred in finding that the second arbitrator in exercising her judicial discretion in terms of Section 193(2), "*had a further duty to ensure that in exercising that discretion she also takes into account the findings that had already being made in the first arbitration award in the evaluation of the relief to be made in the second award... that the first respondent's dismissal in it's proper analysis provided that the requirements for awarding the primary remedy of reinstatement as a general rule had been satisfied, consequently, that the determination by the second arbitrator was to determine whether the dismissal was such that it would be inappropriate to reinstate or re-employ the first respondent...*"
- [16] Section 193(2) provides:
- 'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –*
- (a) *the employee does not wish to be reinstated or re-employed;*
 - (b) *the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
 - (c) *it is not reasonably practicable for the employer to reinstate or re-employ the employee; or*

(d) *the dismissal is unfair only because the employer did not follow a fair procedure.'*

- [17] The second arbitrator understood and appreciated the scope of her mandate as evidenced by the following remarks:

'The dispute came before me as an arbitration. The dispute was remitted to be heard before a new Commissioner to the GPSSBC by the Labour Court pursuant to a successful review by the applicant to allow further evidence to be led by the parties on whether the applicant should be reinstated or compensated as provided in terms of Section 193(2) of the Labour Relations Act No 66 of 1995 as amended.'

- [18] The second arbitrator appreciated that the only issue before her was to determine whether the first respondent after having been found guilty of insubordination by the first arbitrator was unfairly dismissed or whether she ought to have been reinstated or re-employed as contemplated in Section 193(2) of the Act. Further the second arbitrator appreciated that in terms of Section 193(2)(b) an exception to the primary remedy of reinstatement or re-employment in the case of a dismissal is provided, where pursuant to Section 193(2)(b) *"the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable."*

- [19] The issue to be determined is whether the second arbitrator applied her mind properly to the evidential material before her in exercising her discretion pursuant to Section 193(2). The appellant and the first respondent were legally represented by counsel in the second arbitration. Both counsel and the second arbitrator treated the hearing as a remittal to hear and consider evidence *de novo* to enable the second arbitrator to reconsider whether the first respondent should be reinstated or re-employed as envisaged by Section 193(2).

- [20] The second arbitrator was fully aware that in assessing the evidence before her, she was faced with two mutually exclusive versions, that she was required to assess same on the balance of probabilities by accepting one version as being more probable than the other. Further the second arbitrator appreciated that in reaching her conclusion she had to consider that essentially the first respondent denies that the employment relationship between her and the appellant has irretrievably broken down, that in contradistinction the appellant argued that the

circumstances surrounding the first respondent's dismissal are of such a nature that her reinstatement is not possible because the employment relationship between the parties has irretrievably broken down.

- [21] The letter written by Ms Kekana to the first respondent was properly considered by the second arbitrator who also took into account the first respondent's response thereto. The second arbitrator found that the first respondent's letter was derogatory, insulting, contemptuous and disrespectful, that by innuendo and sarcasm the first respondent insinuated that Ms Kekana was stupid unqualified and did not deserve or merit the position she was occupying, consequently, it was questionable how Ms Kekana was appointed to that post.
- [22] The award of the second arbitrator was well reasoned. She assessed the evidence placed before her and came to her conclusions appreciative of the fact that pursuant to Cele J's order the matter was remitted for the determination of the exercise of a judicial discretion by a different arbitrator after the considering the totality of the evidence pursuant to Section 193(2).
- [23] The second arbitrator applied her mind to the totality of the evidence, analysed, evaluated and accepted the appellant's witnesses' testimony as more probable than the first respondent's regarding the breakdown of the employment relationship between the parties and found that the appellant had conclusively established that the employment relationship had irretrievably broken down to such an extent that the employment relationship could not be resuscitated.
- [24] On the totality of the evidence, the second arbitrator found that the first respondent had discharged the onus reposing on it by showing that pursuant to Section 193(2)(b), the circumstances surrounding the first respondent's dismissal are such that a continued employment relationship would be intolerable.
- [25] I accept the second arbitrator's conclusion that these defamatory allegations between the first respondent and the appellant, struck at the core of the employment relationship. Consequently, the second arbitrator cannot be faulted in having found on the totality of the evidence that the reinstatement of the first respondent would be intolerable because the employment relationship had irretrievably broken down.

- [26] The second arbitrator correctly found that the first respondent cannot be reinstated because it was not only the employment relationship that had broken down between the first respondent and Ms Kekana but also that which had existed between the appellant's Department's Head Fati Manamela and the first respondent.
- [27] Regarding the employment relationship between Ms Kekana and the first respondent, the former was not only employed in her personal capacity but she was also employed in a representative capacity as a supervisor of the appellant's department. Consequently, it does not assist the first respondent to argue that because Ms Kekana is the supervisor with whom she had problems with, and has left the appellant's employment, the employment relationship between her and the appellant has not irretrievably broken down.
- [28] The second arbitrator was acting within her mandate when she found employment relationship between the parties had irretrievably broken down after considering the nature and gravity of the insubordination perpetrated by the first respondent against Ms Kekana that the reinstatement of the first respondent was not possible. There is no merit in the first respondent's counsel's submission that the gravity of the misconduct would have been different if the letter written by the first respondent was published. The first respondent published the letter to Fati Manamela the Head of the appellant's Department of Finance. In any event, it is not necessarily a requirement that the first respondent's utterances should be publicised in order to be categorised as gravely serious by the first respondent's superiors or the second arbitrator.
- [29] The second arbitrator had to consider the seriousness of the insubordination committed by the first respondent in assessing the whether the sanction of dismissal was justifiable or substantively fair, and whether there was a possibility of the continuance of the employment relationship. In assessing the remedy to be made in terms of Section 193(2) weight had to be accorded to substantive fairness in as far as it relates to the seriousness of the misconduct of insubordination because the seriousness of the offence plays a critical role in the determination as to whether the employment relationship between the parties has irretrievably broken down or not.

- [30] It is trite that in determining the fairness of the first respondent's dismissal, the second arbitrator had to take into account the totality of the circumstances of the case in question in order to apply the appropriate sanction. In this respect Waglay DJP (as he then was) in *Motsamai v Everite Building Products* in dealing with the issue of sanction had the following to say:

'It is now accepted that when a arbitrator arbitrates a dispute, it is the arbitrator who must decide what is the appropriate sanction having regard to: all of the evidence presented to him/her, the company's code of conduct, and, of course the nature and seriousness [of the] misconduct. The fact that the decision is that of the arbitrator does not mean that can be made in a vacuum. Like any other decision the decision that the arbitrator arrives at in respect of the sanction must also be one that is reasonable in all the circumstances.'

- [31] The second arbitrator took into account that there had been a turbulent relationship and disputes between the first respondent and Ms Kekana, which lead to the offensive letter the first respondent addressed to the latter. It is apparent that the second arbitrator rejected the contention of the first respondent that the dismissal related to a single incident of the letter she wrote to Ms Kekana. The second arbitrator specifically rejected the contention of the first respondent that the relationship between her and her superior was not "*turbulent*". In this respect the second arbitrator found that: "*the letter addressed to the first respondent certainly did not occur in isolation and that it may very well be the result of the culmination of events and situations between the first respondent and her supervisor.*"
- [32] The second arbitrator sets out the reasons why she imposed the sanction. The sanction imposed by the second arbitrator is consistent with rationality and reasonableness. The decision to impose the sanction of dismissal on the first respondent is within the purview of decisions in relation to sanctions a reasonable arbitrator could reasonably reach.
- [33] Because the insubordination affected the heart of the employment relationship, it cannot be argued that the second arbitrator did not rationally and properly exercise her discretion pursuant to Section 193(2) of the Act. Having regard to the evidence placed before the second arbitrator there is absolutely no basis for the finding that

she committed any irregularity in ordering that the first respondent should be compensated as opposed to being reinstated.

[34] In conclusion the decision reached by the second arbitrator not to reinstate the appellant is a decision that a reasonable arbitrator could reach.

The Order

[35] In the premises I make the following order:

- (a) the appeal is upheld;
- (b) the *court-a-quo*'s order is set aside and replaced with the following order;
- (c) the appellant is ordered to compensate the first respondent the equivalent to 7 months salary in the amount of R104 423.00; and
- (d) there is no order as to costs.

Mokgoatlheng AJA

Tlaletsi DJP and Musi AJA concur in the judgment of Mokgoatlheng AJA

APPEARANCES:

FOR THE APPELLANT:

Mr Tshabalala

Instructed by: Ncube Incorporated Attorneys

FOR THE FIRST RESPONDENT:

Mr T Magano

Instructed by Ndhlovu Attorneys

LABOUR APPEAL COURT