IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Not Reportable

Case No: JA78/14

In the matter between:

METSIMAHOLO LOCAL MUNICIPALITY **Appellant**

And

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **First Respondent**

C M REX N.O. **Second Respondent**

IMATU OBO KLAUMANNS-MOLLER ROUX **Third Respondent**

Heard: **6 November 2015**

Delivered: **3 February 2016**

Coram: Musi JA et Coppin JA et Makgoka AJA

JUDGMENT

COPPIN, JA:

[1] This is an appeal with the necessary leave against the judgment and order of the Labour Court (Coetzee AJ), dismissing an application to review and set aside an arbitration award made by the second respondent ("*the arbitrator*"), acting under the auspices of the first respondent, in favour of the two employees represented by the third respondent union.

[2] In terms of the award the arbitrator found that the dismissal of the two employees (Mr Klaumanns-Moller and Mr Roux) by the appellant was substantively and procedurally unfair and reinstated them. The appellant, unhappy with that outcome, brought an application in the Labour Court to review and set aside the award on a number of grounds, which I shall briefly traverse later in this judgment. The Labour Court in a brief judgment rejected the various grounds relied upon by the appellant and dismissed the review application but made no order as to costs.

[3] The appellant unsuccessfully applied to the Labour Court for leave to appeal against the judgment but was granted leave on petition to this Court.

[4] For the reasons I shall mention and elaborate on, I am of the view that the Labour Court was correct and the appeal stands to be dismissed.

[5] The facts and circumstances that culminated in the dismissal of Mr Klaumanns-Moller and Mr Roux (who I will also jointly refer to as "*the employees*") are briefly the following. Both of them were employed by the appellant as electricians. At times certain electrical work was also contracted out by the appellant. The two employees did private electrical work after having given written notification of their intention to engage in such private work during a period of leave that they had sought and had been granted to them. Several other employees of the appellant (about eighteen) also did the same.

[6] At some point, the then Assistant Manager of Legal Services of the appellant, Mr Teboho Mosuoane, who at the time of the arbitration was the Acting Manager in the office of the Municipal Manager of the appellant, got to hear

about this and investigated the matter. He found the employees of the appellant including the two affected employees working for a contractor, or another private party.

[7] Relying on the provisions in a collective agreement, namely clauses 1.2.5 and 1.2.8 thereof, which were binding on the parties and provide that the employees are to "*refrain from accepting any other employment outside of normal working hours without the prior permission of the departmental head or municipal manager (which permission shall not be unreasonably withheld*)", – only two employees, Mr Klaumans-Moller and Mr Roux were charged with and found guilty of gross misconduct. It was alleged and found that they had contravened the collective agreement, in that on or about 31 October 2007 and 1 November 2007 "*they wrongfully and intentionally rendered services for and accepted employment from Siza Mekaar CC without prior permission from the authorised person, alternatively assisted Siza Mekaar CC solely in the execution of their contractual duties towards the municipality and in furtherance of the business of Siza Mekaar CC*".

[8] It was further alleged and found that the conduct of the two affected employees was unwarranted and unreasonable, alternatively unacceptable, in the circumstances, because they were on leave at all relevant times; it was in breach of their common law duty of good faith towards the appellant; and it was irreconcilable with the continuation of a normal employment relationship.

[9] An attorney chaired the disciplinary hearing and Mr Mosuane represented the appellant. The two affected employees were represented by a union official. At the conclusion of the disciplinary hearing the chairperson imposed a sanction of summary dismissal on both affected employees which the appellant gave effect to and they were dismissed on 12 October 2008. Internal appeals by the union (IMATU) and the affected employees were unsuccessful. None of the other employees who had engaged in similar conduct as the two affected employees were charged or disciplined.

[10] The union, on behalf of the two affected employees, referred the dispute to the first respondent for conciliation, failing which arbitration. Conciliation failed and the parties went to arbitration.

[11] The appellant called two witnesses namely Mr Motloung, its Supply Chain Manager, and Mr Mosuoane. The employees gave evidence and they called Mr Johannes van Wyk, Manager of Mechanical and Electrical Engineering, who was the head of their section and to whom they reported and who, in turn, reported to the Municipal Manager and the Director of Technical and Infrastructural Services. They also called Mr Strydom whose evidence is not referred to in the award.

[12] Mr Motloung testified about the existence of the applicable provisions in the collective agreement. He also opined (despite the absence of such a provision) that permission to do private work had to be in writing. Speaking from his knowledge, he denied that either of the two employees had been granted permission to do the private work in connection with which they were charged and dismissed.

[13] Mr Mosuane testified that he investigated after getting a "*tip-off*". He justified not charging the other eighteen employees who also did private work on the basis that he regarded them as "*whistleblowers*" and possible witnesses. He also testified *inter alia* that he had conducted workshops on the collective agreement.

[14] Both employees testified, as they had maintained from the outset, that they did not do private work for Siza Mekaar CC, but for a person named Steven Jacobs and they did so with the knowledge and approval of their superior, Mr Van Wyk. He is also the one who gave them leave. Both of them had applied in writing for permission to do private work. The document that they used to apply for permission had been drafted by Mr Van Wyk to assist illiterate employees and was completed by everyone who wanted to do private work. They were never informed that permission had not been granted for them to engage in the private work. The whole electrical department engaged in

private work from time to time. The electrical department was not prejudiced because they did the private work in their own time (i.e. during their leave).

[15] Mr Van Wyk, in essence, confirmed the evidence of the two employees. He testified that he took the applications of the two affected employees to the Director: Technical and Infrastructural Services, on 14 November 2007 and also wrote a memorandum to the Director in that regard. After the Director left the employ of the appellant in December 2007 he (i.e. Mr Van Wyk) personally took all the applications for permission to do private work to the Municipal Manager.

[16] Mr Van Wyk testified *inter alia* that it was "*standard procedure*" for employees who applied to do private work to commence and continue with such work, unless and until their applications were rejected. For the last six years there had been no specific approval or disapproval of any of the applications. According to Mr Van Wyk, the previous head did not seem to have any problem with it. Even after the two employees were dismissed, the same practice continued and up to the time of his giving evidence at the arbitration, the practice had not been discontinued by the appellant. He confirmed that the other employees in his department (namely Mr Mema and Motloung (not the supply chain Manager)) were never charged even though they had engaged in the same conduct as the employees.

[17] The arbitrator found, on the evidence, that the rule as per the collective agreement had not been contravened by the employees. There was no provision that the permission had to be given in writing. He accepted Mr Van Wyk's evidence of the practice and found that the employees could only have contravened the rule if it had been made clear to them that their applications to do private work had been disapproved. This did not occur in this case.

[18] The arbitrator further found that the appellant had been inconsistent in charging the employees while not charging the other employees, who engaged in the same conduct. He was sceptical of Mr Mosuane's evidence that they were not charged, because they were "*whistleblowers*" and

witnesses. They also did not give any evidence in the disciplinary hearing of the employees. The arbitrator then went on to make the following award:

"Ruling

91. The dismissals of the applicants, Mr H Klaumanns-Moller and Mr J J Roux, are procedurally and substantively unfair.

92. The respondent is ordered to reinstate the applicants on the same terms and conditions of employment which governed the employment relationship between the parties prior to the applicants' dismissal on 22 October 2008.

93. The applicants shall report for duty at 08h00 on 1 December 2009 at the respondent's offices in Sasolburg.

94. The respondent shall pay Mr H Klaumanns-Moller remuneration (back-pay) in the amount of R156 000,00 (R13 000,00 x 12 months) minus normal monthly deductions by no later than 15 December 2009. Should the respondent fail to pay this amount on the date as determined, moratore interest will accrue to this amount at the rate of 15,5%.

95. The respondent shall pay Mr J J Roux remuneration (back-pay) in the amount of R102 000,00 (R8 500,00 x 12 months) minus normal monthly deductions by no later than 15 December 2009. Should the respondent fail to pay this amount on the date as determined, moratore interest will accrue to this amount at the rate of 15,5%."

[19] The appellant brought an application to review and set aside the arbitrator's award. The Labour Court found in essence that the award and findings of the arbitrator were within the bounds of reasonableness and dismissed the application.

[20] It was argued on appeal by the appellant that the evidence did not establish that there was a practice as testified to by Mr Van Wyk and that the employees were contradicted by Mr Van Wyk on this point. Secondly, that Mr Motloung and Mr Mosuoane had given evidence that a practice such as that

claimed by the employees could not override a written collective agreement. Thirdly, that the municipality was obliged to keep records of permission granted and there was no record of permission having been granted to the employees. Further, on this point, that Mr Strydom had confirmed that in the past written permission had been granted. Fourthly, that their evidence did not establish a practice that permission would be granted to do private work for an existing contractor upon their mere application for permission to do such work. On this point, it was submitted that Mr Motloung had given "*clear*" and "*unchallenged evidence*" that it could not have been proper for the municipality to outsource work to a contractor if it had its own resources and staff to do the work and that permission would not have been given in such circumstances.

[21] It was further submitted on behalf of the appellant that it was the employees' version that everyone knew that they were doing private work, but they did not establish that the Municipal Manager and/or Director of Technical Services and Infrastructure had such knowledge. The fact that Mr Van Wyk knew did not assist them, because he had no power to authorise them to do private work.

[22] The appellant further submitted that the finding by the arbitrator that an employee could do private work until and unless his application for permission to do such work was refused was "*unsustainable and illogical"* and that a reasonable arbitrator would have found the contrary. On this point it was submitted that the mere fact that the employees were required to apply for permission was inconsistent with the finding.

[23] On behalf of the appellant it was further submitted that because the collective agreement provides that an application for permission must be in writing a variation of it must "*axiomatically*" also be in writing. Further, that it was not shown that the practice arose from a person of authority such as the Municipal Manager or the Director of Technical Services. Further, that if there was a practice as testified to by the employees, it would have been unlawful to apply where work was being done for a contractor, because it would have

amounted to the sanctioning of fruitless and wasteful expenditure. It was pointed out that Mr Motloung had testified that if services could be performed internally it would have been unfair to outsource them to someone who had no capacity to perform them and who needed to use the appellant's employees to perform them. According to the appellant this evidence of Mr Motlaung was ignored. I shall now proceed to deal with the submissions before dealing with the submission made by the appellant regarding the issue of inconsistency.

[24] Fundamental to the appellant's submissions is the fact that permission had not been given, but it did not call either the Director, or the Municipal Manager, to prove that fact. Neither Mr Motloung, nor Mr Mosuoane, had personal or dependable knowledge of that fact. They expressed their personal opinions on the matter. It would have been very easy for the appellant to produce direct reliable evidence that permission in any form had not been given, but that was not done.

[25] The provision in the collective agreement is clear. It does not expressly state that the permission has to be given in writing and there is nothing to show that it implied that the permission had to be in writing. In any event, the *onus* was on the employer to prove that the employees broke a rule which was clear and certain. That would have included establishing that the employees knew that the required permission had to be in writing. In any event, if the intention was that permission had to be in writing, why was the rule itself silent about it?

[26] Despite the fact that the third and further respondents, which includes the affected employees, produced evidence of an established practice, as explained by Mr Van Wyk and Mr Strydom, the appellant did not produce any evidence to refute it. Instead of arguing that it was for the employees to show that the practice emanated from a person or persons in authority, it was in actual fact for the appellant to show through such persons, that such a practice did not exist.

[27] The evidence of Mr Van Wyk and Mr Strydom was direct and persuasive that such a practice existed. The court *a quo* in my view correctly found that it was within the boundaries of reasonableness for the arbitrator to find, in light of all the evidence, that the employer did not prove that the employees had contravened the rule relied upon.

[28] It is not contested that the employees did the private work after having applied in writing, in the usual form, for permission to do such work. They performed it in accordance with the standard practice which was in existence and continued to exist at the appellant, according to the evidence – which was not refuted or effectively refuted. They did so with the knowledge of Mr Van Wyk, who also submitted their applications to the requisite persons together with an accompanying memorandum. There is no evidence that the employees were at any stage denied permission by such persons in authority. The evidence they produced suggests the contrary, namely, that in the absence of express refusal of permission, the permission was taken to have been given.

[29] The respondent in my view correctly submitted that if so-called "*moonlighting*" was to be effectively prohibited there ought to have been a specific rule, which must have been made known to the employees, that "*moonlighting*" was not permissible. For a dismissal based on "*moonlighting*" to be fair there must be proof of such a rule, knowledge on the part of the employee of the rule and breach of such a rule by the employee.

[30] Clause 1.2.8 of the collective agreement, which was relied upon by the appellant, does not outlaw "*moonlighting*". It expressly provides that employees had to apply for permission to do private work and it states that such permission shall not be unreasonably withheld.

[31] With regard to the issue of inconsistency, the appellant sought to justify its decision not to charge the other employees who, in effect, engaged in the same conduct as the affected employees. It submitted that the former admitted that they performed work for the contractor and were required as witnesses to prove that the employees in fact worked for the contractor.

Further, that the employees were more senior than the others and had influenced others to work for the contractor.

[32] According to the appellant, this was a case where the parity principle had to be applied "*with caution*", because the appellant was an organ of State and the application of the principle would allow employees to make a double profit at the expense of the appellant "*contrary to the ethical norms set by law and to mandatory procurement processes which require transparency*".

[33] In my view none of these arguments are valid at all. The fact is that the appellant failed to give a reasonable and/or rational explanation for not charging the other employees and for only charging Mr Klaumanns-Moller and Mr Roux. None of the eighteen other persons engaged in the same conduct were called as witnesses and none of them were disciplined. Mr Mosuoane's explanation for not charging them rings hollow in the light of that. The impression is that the appellant, finding itself unable to give the true reason for not charging those other persons, "*clasped at straws*" such as seniority and alleged influence. There was no direct and acceptable evidence that any of the other employees were influenced by the employees. Ultimately the appellant sought to rely on conjecture. The other eighteen employees could clearly not have been "*whistleblowers*" as contemplated in the legislation pertaining to protected disclosures. Mr Mosuoane's evidence begs the question how all eighteen persons could have "*blown the whistle*". The clandestine element is also missing.

[34] There is no evidence that Mr Klaumanns-Moller and Mr Roux concealed the fact that they were doing private work. It was not contested that they applied for permission in writing and that not only their superior Mr Van Wyk knew, but that their applications, together with a memorandum prepared by Mr Van Wyk, had been submitted to the Director and to the Municipal Manager.

[35] The inconsistency, which in my view was clearly shown, was not the only reason why the arbitrator found that the dismissals of the respondent employees were not fair. It was merely one of the reasons.

[36] The appeal clearly lacks merit. Taking all the factors into account there is no reason in fairness or in law why the costs should not follow the outcome.

[37] In the result the appeal is dismissed with costs.

P Coppin

Judge of the Labour Appeal Court

Musi JA and Makgoka AJA concur in the judgment of Coppin JA.

Appearances

For the Appellant	Adv F A Boda SC
Instructed by	Lebea & Associates Attorneys
For the Third Respondent	Adv S Grobler
Instructed by	J Nortje (Attorney)