

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA163/17

In the matter between:

MAPITSI GLADYS SEGONA

Appellant

and

THE EDUCATION LABOUR RELATIONS

COUNCIL

First Respondent

E MAREE

Second Respondent

MPUMALANGA DEPARTMENT OF EDUCATION

Third Respondent

Heard: 9 May 2019

Delivered: 27 June 2019

CORAM: Waglay JA, Coppin JA et Savage AJJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the judgment of the Labour Court (Beckenstrater AJ), in which an application brought by the appellant to review and set aside an award of the second respondent ("the arbitrator"), acting under the auspices of the first respondent ("the ELRC"), was dismissed. Leave to appeal to this Court was granted by the Labour Court, albeit on a very tenuous ground. None of the respondents opposed the review application in the Labour Court, nor did they participate in the appeal.

- [2] The award relates to a dispute that the appellant had with her employer, the third respondent (“the Department”), after it had demoted her as a sanction following a disciplinary hearing where she had been found guilty of multiple charges relating to the storing of computers, the under-banking of school funds, and monetary claims she allegedly submitted. Although the arbitrator found that certain of these charges were not proved by the Department, her ultimate finding was that the appellant had failed to prove that the Department had committed an unfair labour practice by demoting her following the disciplinary hearing.
- [3] Prior to her demotion, the appellant was employed by the Department as principal of the Langalibalele Primary School in Mpumalanga. She was demoted to the position of deputy – principal at another school.
- [4] During December 2008, the appellant was charged with 17 counts of misconduct. In charge 1, it was alleged that the appellant had contravened section 18(1)(f) of the Employment of Educators Act¹ (“the EEA”) in that she “unjustifiably prejudiced the administration, discipline or efficiency of the Department of Education, office of the State or school” by taking computers donated to her school and keeping them at her home for a period of more than two years. Charge 2 related to an alleged false statement that the appellant made concerning a driving assistant’s possession of a driver’s licence. Charges 3 to 5 (inclusive) related to the alleged contravention of section 18(1)(cc) of the EEA, in particular, to various amounts allegedly under-banked by the appellant and charges 7 to 17 related to amounts allegedly dishonestly claimed by the appellant from the school or the school’s governing body.
- [5] A disciplinary hearing in respect of those charges was held early in 2009 and the chairperson of disciplinary hearing handed down his findings on 4 May 2009. He found the appellant guilty of 15 of the 17 charges, that is all the charges, bar charges 2 and 7. The employer called three witnesses and relied, *inter alia*, on an investigation report compiled in respect of those charges, with supporting documents. The appellant, who was legally

¹ Act 76 of 1998.

represented, did not give evidence and her representative was content with making submissions. The appellant was informed by written notice on 4 May 2009 of the chairperson's sanction. The relevant part of the notice reads: "after taking into consideration all arguments during the hearing and also mitigating and aggravating factors, I pronounce my sanction as follows: – that you are demoted from the position of being the principal of Langalibalele Primary School. – That you should be placed at the level of deputy principal, which is equivalent to salary level PL. 3 – That you be removed from Langalibalele Primary School and replaced in another school or institution where you will be supervised thoroughly." The notice also informed the appellant of her right to appeal to the MEC of the Department.

- [6] The appellant duly exercised her right to appeal. She made written representations to the appeal authority, essentially, denying that the charges had been proved at the disciplinary enquiry. In the concluding paragraph of her written representations, she states: "we believe that the chairperson can only arrive at the finding after evidence is brought to him to examine. In this instance, no evidence documentary or otherwise was brought before the chairperson. We will dispute all the allegations of the employer because in the absence of proof, they remain as such, allegations. We believe that the repetition of the allegations by the employer through its witness does not amount to proof. The presiding officer, therefore, lacks proven facts from which to infer guilt. He erred by finding me guilty on all the charges. We believe our right to a fair trial [hearing] has been highly compromised by the procedure that was used to conduct the hearing. It is only through a fair procedure that you can arrive at a just conclusion. Since the procedure was not fair the result cannot be fair. The desired outcome of the appeal is that both the findings and sanction of demotion be set aside."

- [7] By letter dated 13 April 2010 the MEC of the Department informed the appellant that her appeal had been unsuccessful. The letter, *inter alia*, states: "The evidence before me shows that you and your representative did not challenge the testimony presented by the employer witnesses, especially the first witness, and the only inference to be drawn from this action is that you

were in agreement with his testimony.” The first witness at the disciplinary hearing was Mr Kgomphiri., finance manager of the region who had been appointed to investigate the financial records of the school. He gave detailed evidence of the findings of the investigative team. The two other witnesses were Mr Masilela of Asset Management who had also been delegated to investigate the circumstances around the acquisition and storing of the computers, and a Ms Fankomo, chairperson of the school governing body (“SGB”) of Langelibalele Primary School.

- [8] Having been unsuccessful in the internal appeal, the appellant referred her dispute with the Department to the ELRC in terms of the Labour Relations Act² (“LRA”). In the referral form, she indicated that the dispute was about misconduct and she wanted the decision of the MEC of the Department to be reversed. The arbitrator ruled subsequently that the dispute was about an unfair labour practice and that the appellant bore the *onus* to prove that by demoting her, the employer had committed an unfair labour practice.
- [9] At the ensuing arbitration before the arbitrator, the appellant gave evidence in her defence of the charges. She explained, *inter alia*, how she came to store the computers at home, testifying, in essence, that it was with the knowledge and consent of the SGB and for their safekeeping. She further denied under banking monies and that she was the accounting officer, and denied being responsible for receiving and banking monies of the school. She also denied making the claims that formed the bulk of the charges that she had been found guilty of (i.e. charges 7 to 17). The appellant then called a witness, a Ms Maria Madibata, to corroborate her version concerning the storing of the computers. The employer, in turn, called Mr Kgomphiri. His testimony was materially the same as at the disciplinary hearing; and he again produced the investigation report and some of the supporting documentation that he had relied on at the disciplinary hearing.
- [10] It appears from the arbitrator’s award, that having analysed the evidence, she found that the appellant was guilty of the charge relating to the computers (i.e. charge 1) and the charges of under-banking (i.e. charges 3 to 5), all of which

² Act 66 of 1995.

involved an element of dishonesty. The arbitrator considered that the sanction of demotion had been fair in the circumstances, since even a dismissal would have been warranted. The arbitrator further concluded that the appellant had failed to prove, that in demoting the appellant after she had been found guilty of the charges at the disciplinary hearing, the employer had committed an unfair labour practice. The arbitrator, consequently, dismissed the appellant's claim.

[11] As a result, the appellant brought an application in the Labour Court to review and set aside part of the arbitrator's award and requested the Labour Court specifically to substitute the impugned part of the award with such a ruling as the Labour Court "deems fit". The application was not opposed. The appellant relied on various grounds under the general rubric that the arbitrator's award was not one that a reasonable decision-maker would make. She supplemented the grounds of her review by way of a supplementary founding affidavit. The appellant averred that the arbitrator misconstrued the dispute as one of unfair labour practice, whereas it was about misconduct. The appellant submitted that the arbitrator had committed a gross irregularity by placing the onus of proof on the appellant. She alleged that this "offended against both the principles which are settled in our law that a person is regarded as innocent until proven guilty" and that "he who alleges must prove". The appellant alleged that the true issue that had to be determined by the arbitrator was whether the employer (the Department) had authority to charge her with misconduct and if so, whether the findings of the Department concerning those charges were "substantially and procedurally fair". In addition, the appellant raised several other grounds relating to the arbitrator's findings and concerning the evidence she gave at the arbitration hearing, including alleged errors of law and the fact, and of an alleged failure to take into account relevant evidence given in the arbitration concerning the charges of under-banking.

[12] The Labour Court rejected all of the grounds raised by the appellant and dismissed the application. The appellant then applied to the Labour Court for leave to appeal to this Court. It appears from the judgement of the Labour

Court on the application for leave to appeal that the appellant relied on three grounds: the nub of the first was that the employer led no evidence in respect of charge 1 at the arbitration and therefore the appellant's version ought to have been regarded as uncontested and to have resulted in a finding that she was not guilty of the misconduct alleged in that charge. The second and third grounds relied upon related to the under banking charges. The main point raised by her being that it could not be found that she was the accounting officer of the school and therefore responsible for the banking.

[13] Although the Labour Court found no merit in any of those grounds, it nevertheless granted the appellant leave to appeal to this Court in respect of a finding made, namely, whether the appellant could be said to be dishonest on the say-so of the forensic auditor, Mr Kgomphiri. According to the Labour Court, it may be that another court find that the arbitrator did not properly consider Mr Kgomphiri's statement, namely, that he did not say that the appellant was dishonest, and that the appellant should reasonably only have been found guilty of negligence, rather than dishonesty in respect of charges 3 to 5. But it is difficult to perceive how negligence could be found on the facts. It was never the case of the employer or of the appellant that she had been negligent in under-banking school funds. The appellant, in fact, denied under- banking the monies.

[14] It is trite that leave to appeal is only granted in respect of court orders, or judgements, and not in respect of the underlying findings of fact.³ In the present matter, it is not clear at all how this finding, in respect of which the Labour Court had granted leave, would impact on the overall conclusive finding that the arbitrator's award fell within the bounds of reasonableness, and, ultimately, the Labour Court's order dismissing the review application. The appeal is thus before us on a tenuous, if not legally unsustainable, basis.

[15] In any event, whether or not the appellant was dishonest concerning the computers or the under-banking is a matter of inference. The Labour Court did not err in concluding that the application for review was to be dismissed. There was no justification for interfering with the arbitrator's award, which was

³ *Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others* (605/2016) [2017] ZASCA 47 (31 March 2017).

to the effect that the appellant had failed to discharge the onus of proving that the conduct of employer in demoting her, subsequent to finding her guilty of, at least, charges one, three and five, amounted to an unfair labour practice.

- [16] While the arbitrator does mention in the award that the evidence given by Mr Kgomphiri at the disciplinary hearing and the report of the chairperson of that hearing was not disputed at the arbitration, the arbitrator and the Labour Court appear to have overlooked another important fact, namely, that the appellant did not testify at all at the disciplinary hearing – that despite the fact that a case was made out against her that called for an answer.
- [17] Mr Kgomphiri's evidence at the disciplinary hearing, concerning the storing of the computers and the over- and under-banking of amounts, implicated the appellant in misconduct, but was not challenged at all. His evidence at the arbitration was consistent with that he gave at the disciplinary hearing. He testified, *inter alia*, that the investigators, which included him, interviewed the appellant, and that she, *inter alia*, informed them that she collected and deposited the school's monies. She also ascribed the under-banking to the fact that they would spend some of the monies collected before the balance was banked. She could not explain the fact that receipt books for 2006 were missing and the investigation established that most of the money received for that year was not banked and was unaccounted for. In respect of the 2007 year, the investigation showed that the appellant collected or received school funds which she never banked.
- [18] The second witness at the disciplinary hearing, Mr Masilela, was only briefly cross-examined by the appellant's representative concerning his knowledge of the policy that forbade the storing of computers at home, or concerning the removal thereof. The essence of his evidence, though, was that there was such a policy and that there was no proof that the SGB had given the appellant permission to store the computers at her home. His evidence called for an answer. The third witness at the disciplinary enquiry, Ms Fankomo, who was chairperson of the SGB of the school since 2005, testified that the SGB was not aware that computers had been donated to the school until one parent informed them of it; they then reported the matter to the regional

director who was also not aware of the donation and that resulted in the matter being investigated. She also testified that they received a report from the investigators that the computers had been donated, but were being stored at the appellant's house. In January 2007, the SGB was shown computers that were still covered in plastic, and even though they never uncovered them, they were told that the computers were dysfunctional. Ms Fankomo, also testified concerning the appellant's involvement in the finances. According to her, the appellant had presented cheques to her for signature and sometimes she would sign blank cheques for the appellant at the latter's request. Her cross-examination appears to have been very brief; she was accused of being untruthful. This evidence and the version of Mr Kgomphiri belie the version of the appellant at the disciplinary hearing that she did not receive or under-bank the school's money.

[19] The evidence given at the disciplinary hearing, as summarised in the chairperson's report, clearly called for an answer from the appellant, but such answer was not forthcoming at the disciplinary hearing. Instead, the appellant's representative contended that the evidence adduced by the employer was hearsay and should be ignored. That contention was correctly rejected. Further, it is a trite principle of law that an adverse inference may be drawn against a party who failed to testify, if there was a case to be answered.⁴ The inference to be drawn is that the party did not give evidence because he, or she, did not stand to benefit from doing so and he, or she, might have prejudiced himself (or herself) by being subjected to cross-examination.⁵ The fact that the appellant did not testify at the disciplinary hearing also seems to have weighed heavily, and justifiably, with the appeal authority, namely, the MEC for Education in Mpumalanga.

[20] In order for the appellant to have made out the case for unfair labour practice, she was required to also show that the employer was not entitled to draw an adverse inference from her failure to testify and to subject herself to cross-examination at the disciplinary hearing. The fact that she chose to give

⁴ *Bargaining Council for the Furniture Manufacturing Industry Kwazulu-Natal v UKD Marketing and Others* [2013] 2 BLLR 119 (LAC) paras 15-17.

⁵ See previous footnote.

evidence at the subsequent arbitration hearing does not assist her in that regard.

[21] Notwithstanding, the arbitrator subjected the evidence adduced for both employer and the employee at the arbitration to a thorough analysis and came to the conclusion that a reasonable arbitrator could have arrived at in respect of the evidence given at that hearing. The arbitrator also reasonably doubted the veracity of Ms Madibata, particularly because of its internal contradictions, but went as far as giving the appellant the benefit of the doubt in respect of certain of the charges of misconduct she had been found guilty of.

[22] There is also no merit in the point raised by the appellant regarding the arbitrator's characterisation of the dispute. The arbitrator did not err in that regard. Section 191 of the LRA recognises only two kinds of dispute that may be referred to a council such as the ELRC, namely, disputes about the fairness of a dismissal and disputes about an unfair labour practice. The appellant's dispute with the employer was most definitely not one about an unfair dismissal, but clearly one relating to her demotion. In terms of section 186(2) of the LRA an "unfair labour practice" is defined as including unfair conduct by the employer relating to the demotion of an employee. As for the *onus* of proof, it was for the appellant to prove the unfair labour practice.⁶

[23] The Labour Court also subjected the arbitrator's reasoning to yet closer scrutiny and rightly held that the award was one which a reasonable arbitrator could have made.

[24] In the result, the following order is made:

The appeal is dismissed.

P Coppin

⁶ See *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 948 (LAC) para 73; *NEHAWU obo Manyana and Another v Masege N O and Others* [2014] ZALC JHB 124 (8 April/2014) para 36 and the case authorities cited there.

Waglay JP and Savage AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT: Adv. Johria van den Berg

Instructed by Errol Ntuli Attorneys

FOR THE RESPONDENTS: No Appearance for the respondents