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Of interest to other judges

REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case No: JR 1303/09

In the matter between:

FREDERICK HENRY LUBBE

Applicant

PRAHASH ROOP (N.O.)

First Respondent

SAPS

Second Respondent

**SAFETY AND SECURITY BARGAINING
COUNCIL**

Third Respondent

JUDGMENT

HEAD NOTE: (review-unfair dismissal- reinstatement as a remedy-long delay)

LAGRANGE, J

Background

- [1] This matter has a long history. This is the second occasion when the matter of the applicant's dismissal has been the subject of review proceedings.
- [2] In January 1975, the applicant started his employment with the South African Police Services, the second respondent. In 2002 the applicant was charged with 20 counts of misconduct. At the conclusion of the disciplinary proceedings which ended on 6 February 2004, nearly 20 months after they started, the applicant was found guilty of seven of the charges. Penalties in the form of fines were levied for each act of misconduct amounting in the aggregate to R700.
- [3] The applicant appealed against the findings that he was guilty of the seven charges in question. When the appeal was considered in 20 December 2004 the chairperson overturned the sanction of the disciplinary enquiry and dismissed the applicant. In the course of arriving at this drastically different outcome the chairperson of the appeal hearing also found the applicant guilty on three additional charges. No cross-appeal had been launched by the employer against the findings or sanction of the chairperson of the disciplinary enquiry.

[4] The applicant referred an unfair dismissal dispute to the Safety and Security Sectoral Bargaining Council. On 2 November 2006, the arbitrator decided that the findings of the chairperson of the appeal hearing were invalid and set aside the applicant's dismissal. The second respondent then successfully applied to review the arbitrator's award. The matter was sent back for a fresh hearing before another arbitrator on 20 March 2007.

[5] The second arbitration hearing commenced before the first respondent on 31 May 2007 and the presentation of evidence was only concluded on 21 June 2008. The second arbitration award was handed down on 28 July 2009. These proceedings according to the arbitrator ran for 49 days. He somewhat wearily records in his award that the annexures filled up two lever arch files, and his own handwritten notes filled 22 examination pads. On this occasion, the arbitrator found that the applicant was guilty of only four of the seven charges on which he had originally been found guilty of in the disciplinary enquiry in 2004.

[6] It should be mentioned at this point that the applicant chose not to transcribe all the proceedings. Instead he presented only that portion of the proceedings that might have been relied on as evidence relevant to the question of whether or not he ought to have been reinstated. In its answering affidavit, the second respondent's legal administration officer states:

"If the entire record is not dispatched and the applicant takes no issue with that and does not compel the third respondent to file the entire record, it is assumed that the applicant has elected to proceed with review on the basis of that which is before the Court and will not make issue with that which is not before the Court. The second respondent files this answering affidavit on the presumption that the applicant relies only on the part of the record which has been dispatched to the Registrar this Court."

[7] Rule 7A(5) of the Labour Court rules does not require a party to reproduce the whole record of the arbitration proceedings when bringing a review application. The rule speaks of the applicant making "...copies of such portions of the record as may be necessary for the purposes of the review" (emphasis added). Obviously, where it is not necessary to reproduce the whole record an applicant must nonetheless reproduce those portions which both support and tend to contradict its case on review. If a respondent believes the record produced is inadequate, it should indicate this in its replying affidavit, so any deficiencies in the record for the purposes of a proper consideration of the application may be remedied.

The charges

[8] The sake of completeness, it will be useful to summarise the charges of which he was found guilty in the second arbitration. The first charge

related to the loss of a case docket in Vryburg. The arbitrator found that the only charge of which he was guilty in relation to this docket was of keeping the docket in his desk rather than in his safe to prevent it being lost. Accordingly he was negligent in losing the docket.

[9] The second charge in respect of which the applicant was found guilty was the failure to record certain allegedly stolen wheels as exhibits, which he should have done. The next charge which the arbitrator upheld was one in which the applicant was accused of failing to initiate disciplinary steps against another SAPS member after he became aware of the member's alleged misconduct in respect of missing money. The last charge was one of assault relating not to the exercise of any physical violence as such by the applicant but arising from an utterance he made to 2 individuals in the following terms: "Hoe ry julle, julle ry kak, julle gaan kak, Ek sal jou doodbliksem."

The appropriate sanction

[10] In evaluating the appropriate sanction for these different acts of misconduct, the arbitrator said the following:

"I must also take into account that the charges are not related to each other, and that they, in some cases, were only prosecuted long after the occurrences, and also that a number of the other charges preferred against Lubbe were far from convincing and appear to be a waste of time."

The first of these charges relates to his negligence losing a docket, but in the circumstances of how the docket went missing with two other dockets for which he was not charged for, and with this an almost daily occurrence in SAPS, will, at best, normally attract a serious sanction of a warning or more, but not of dismissal.

As regards the second of these charges, the misconduct relates to Lubbe's failure to have booked wheels into the SAPS, but he provides a reason for such failure and attempted to keep it in a safe place, which will again, at best, attract a less serious sanction such as a warning or more, but not dismissal.

In respect of the third of these charges, the misconduct once again relates to Lubbe's failure to have taken disciplinary action against Botha for Botha's alleged misconduct, and will again, at best, attract a less serious sanction such as a warning or more, but not dismissal.

As regards the fourth of these charges, the misconduct in this instance was of a more serious nature, as the position of the occupied at the time was that of such high office that he was to prevent the occurrence of such instances on behalf of the greater community he served, which is more serious than the other three charges. However, his conduct was restricted to a threat but which he did not follow by the use of any force, which lessens its severity somewhat. I believe you should have received a final written warning or more serious sanction this misconduct such as suspension without pay, but not of dismissal.

I therefore find that the sanction of dismissal of Lubbe, on the charges for which he is guilty of, was unfair."

(sic)

[11]The arbitrator then considered whether the applicant should be reinstated having found that his dismissal was substantively unfair. He set out his reasoning on this question as follows:

"However, in considering what relief he is entitled to, I do not believe reinstatement is even remotely an option in this instance. Firstly, the manner in which Burger, representing the views of Lubbe, constantly made the refrain that Lubbe was the object of a well orchestrated vendetta involving a number of very senior members of SAPS in order to rid the SAPS of Lubbe, and in the light of, the request for reinstatement is very puzzling. Secondly, the very period between the dismissal of labour and the finalisation of this arbitration is roughly 7 years, a period during which the SAPS did undergo many changes must reflect a workplace very different to that which Lubbe left in 2002, and it is inconceivable that he could simply go back and that it would be business as usual. I therefore find Compensation choose to to be the most appropriate form of relief in this matter. When considering the quantum of relief Lubbe is entitled to, I must take into account that he's been found guilty of four charges, three of which are less serious but the fourth a more serious nature."

(sic)

Grounds of review

[12]The applicant only takes issue with two matters arising from the award.

Firstly, he contends that the arbitrator failed to determine whether or not the chairperson of the appeal hearing had the authority to impose a more severe sanction than the chairperson of the disciplinary enquiry. Secondly, he takes issue with the arbitrator's conclusion that he was not entitled to reinstatement, which is the primary remedy for a substantively unfair dismissal. For the reasons which follow it is not necessary for me to determine the first issue.

Did the arbitrator commit a reviewable error in not reinstating the applicant?

[13]The question here is whether the arbitrator committed a reviewable error in awarding compensation instead of reinstatement as appropriate relief for the applicant's unfair dismissal. In arriving at his conclusion that compensation would be more appropriate than reinstatement, the arbitrator provided two reasons. Firstly, he concluded that submissions made by the applicant's representative that there was a well orchestrated vendetta by a number of senior members of the SAPS to rid SAPS of the applicant was at odds with his claim for reinstatement.

Implicit in this conclusion is an inference that the allegation amounted to a statement that the employment relationship had broken down and could not be restored.

[14]The applicant contends that there was no evidence from the employer itself to the effect that the relationship had broken down and that he could not be reinstated. Consequently, he argues there was no basis for the arbitrator to deny him the primary remedy of reinstatement. He nonetheless transcribed the only evidence which he believes might have been considered relevant to this question by the arbitrator. It is interesting to note that the second respondent itself makes no reference to any of this transcribed evidence in support of its contention that the arbitrator's conclusion on the breakdown of trust is unassailable. The second respondent's answering affidavit defends the arbitrator's finding on the remedy as one that was determined after a judicious exercise of his discretion, after taking into account the factors he considered.

[15]The Labour Appeal Court and the Supreme Court of Appeal have, in recent times, grappled with the circumstances in which an arbitrator would be entitled to conclude that an employment relationship had irretrievably broken down. In upholding the decision of the LAC in **Edcon Ltd v Pillemer NO & others (2008) 29 ILJ 614 (LAC)**, the SCA stated in **Edcon v Pillemer NO & others (2009) 30 ILJ 2642 (SCA)**:

"[22] Pillemer [the arbitrator] was entitled and in fact expected, in the scheme of things, to explore if there was evidence by Edcon and/or on

record before her showing that dismissal was the appropriate sanction under the circumstances. This was because Edcon's decision was underpinned by its view that the trust relationship had been destroyed. She could find no evidence suggestive of the alleged breakdown and specifically mentioned this as one of her reasons for concluding that Reddy's dismissal was inappropriate. A reading of the award further reveals that in addition to this finding Pillemer also found that in the context of that matter Reddy's long and unblemished track record was also an important consideration in determining the appropriateness of her dismissal.[23] It is inevitable that courts, in determining the reasonableness of an award, have to make a value judgment as to whether a commissioner's conclusion is rationally connected to his/her reasons taking account of the material before him/her. That this is the correct approach has been stated on a number of occasions by the LAC, this court in the Sidumo matter as well as the Constitutional Court in the same matter. In my view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair. She cannot be faulted on any basis and her conclusion is clearly rationally connected to the reasons she gave, based on the material available to her. She did not stray from what was expected of her in the execution of her duties as a

CCMA arbitrator. The challenge, therefore, to Pillemer's award on this basis is without merit. I have no hesitation in concluding that the award issued by her is properly compliant with the constitutional standard of reasonableness propounded in Sidumo.”¹

[16] On the basis of this authority, it is now clear that it will normally not be sufficient for an employer simply to make submissions that there has been an irretrievable breakdown in the relationship unless a clear basis has been laid in evidence to justify such a conclusion. It is also evident that such a conclusion will not be easily drawn simply because of the nature of the misconduct at issue in the case. The facts in the *Edcon* matter as summarised by the LAC illustrate this point:

“[3] In accordance with the applicant's policy, the third respondent, then CTM quality controller, was entitled to a company car, which she received in April 2003. There were terms and conditions. It is common cause that in the event of an accident involving the vehicle, she would be required to -

- report the accident within 24 hours to the SA Police Service and obtain a case number;*
- to report any accident to the appellant and to the relevant insurance company;*
- to complete and sign the relevant motor accident claim form;*

¹ At 2652

- *not to carry out any repairs without the approval of the insurance company.*

[4] On 8 June 2003, the vehicle was involved in an accident while being driven by her son. She did not report the accident to the police nor to the appellant. She did not meet the other requirements set out in para 3 hereof. Her husband repaired the vehicle in his panel beating workshop at his own cost. It transpired later that the reason for non-compliance was that she was under the impression that her son was precluded from driving the vehicle in terms of the car policy. It turned out later that the impression was wrong.

[5] After about six months from the date of the accident, the appellant got to know about the accident. When confronted in regard thereto, the third respondent initially denied the vehicle had been involved in an accident, she also denied that her son was driving. She eventually admitted the accident but she still told an untruth as to where it occurred and under what circumstances.

[6] On being questioned further, she made a clean breast of everything. She was suspended and charged in an internal enquiry. The charge against her was as follows: Failure to be honest and act with integrity in that -

'[y]ou committed an act, which has affected the trust relationship between the company and the employee in that on 6 June 2003 you

failed to report an accident of a company vehicle (reg no ND 95403, Toyota Corolla GLE, grey in colour) which your son was driving on the day of the accident (8 June 2003) and this resulted in a breach of trust between yourself and the company ' (emphasis added).

[7] She pleaded guilty and was found guilty. The real issue for determination was whether the misconduct committed resulted in a breach of trust between the third respondent and the appellant or whether the sanction of dismissal was fair in the circumstances of the case. It will be noted that the element of breach of trust relied upon was the failure to report the accident. The allegations against the third respondent do not rely on the continuing lies by her after the accident was discovered.’²

[17]What emerges from this extract is that the very offence which the applicant was charged with, related to the trust relationship, yet the LAC and the SCA both found that the employer should have led direct evidence on how the employee’s conduct had irretrievably destroyed the trust relationship. It should be noted that in *Edcon*, there was also hearsay evidence, which was properly admitted, that gave rise to an inference that there had not been a breakdown in the relationship and that the employer had treated another employee in similar circumstances more leniently.

² At 616-617

[18] In this instance, the only evidence relied on by the arbitrator is the applicant's own representative's contentions that senior members of the SAPS had conspired against him. If an employee who was unfairly dismissed contends that his employer sought to get rid of him for improper reasons, does that necessarily entail a breakdown in the trust relationship of the type which justifies not reinstating him? It would be somewhat perverse if an employer wishing to assert that the employment relationship had been rendered intolerable, on the basis that its own bad faith in dismissing the employee had instilled distrust of it in the employee, were able to avoid an order of reinstatement on that basis³. Equally, there is no basis for permitting an employer to avoid an order of reinstatement merely because the employee's representative accuses it of acting in bad faith. In this case the 'evidence' of a

³ This issue was considered in a different, but arguably analogous, context of determining the legality of the dismissal of the Director of the National Intelligence Agency by the President. The court *a quo* in **Masetlha v President of the Republic of South Africa and Another (2007) 28 ILJ 1013 (T)** held, per Du Plessis J, that: "*I accept, however, that the reason for a breakdown in the relationship of trust between a president and a head of an intelligence service may be relevant to determine the legality of the dismissal of such head of intelligence. For instance, if a president in bad faith caused the breakdown of trust in order to get rid of the head of intelligence, the dismissal may not pass constitutional muster.*" (at 1021D-F), a comment that was endorsed by the majority of the court in the Constitutional Court case in the same matter. Moseneke DCJ, writing for the majority in **(Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC)** held: "[82] Reverting to the present case, I agree with the High Court that ordinarily a dismissal of a head of an intelligence service on the basis of irretrievable loss of trust on the part of his principal, in this case the President, would not be arbitrary or irrational. Of course, the facts in a particular case may demonstrate irrationality, arbitrariness or bad faith on the part of the person who makes the dismissal decision. In this case, nothing suggests that the President acted arbitrarily or without sufficient reason", at 595.

breakdown of trust are merely allegations of bad faith made by the employee's representative.

[19]It is also clear that the applicant never abandoned his claim for reinstatement. In this regard the remarks of Cameron JA, in the case of **NCBAWU & another v MF Woodcraft (Pty) Ltd [1997] 1 BLLR 43 (LAC)** are apposite:

*"The third reason the Industrial Court gave for denying reinstatement was that an "enforced" working relationship would not be tolerable "to either side". This reason was in my view also mistaken. That the respondent regarded a future working relationship with the appellant as intolerable was clear. That is why it tried three times to dismiss him. Its attitude, although relevant, cannot be determinative of whether there is "reason to refuse reinstatement". The reasons it gave, namely fraudulent conduct and disruptiveness, were held to lack substance. What of tolerableness from the second appellant's point of view? He may safely be assumed to be a resilient individual, whose sensitivities will survive the slight of having been unjustly dismissed three times. His persistence in seeking reinstatement indicates that he, certainly, will not find the future working relationship intolerable."*⁴

⁴ At 50

[20]Albeit that the *Woodcraft* case was an appeal under the previous Labour Relations Act, the LAC was seized with considering the same issue of circumstances in which reinstatement would be intolerable.

[21]The only evidence on the record emanating from the employer about the possible future working relationship that would prevail if the applicant was reinstated, is that of the employer's representative, who did not work with the applicant and only came to know him in the course of the proceedings. Given that this was the second time this dismissal case had been processed through the arbitration mill, at considerable length, it is difficult to comprehend that the employer could not have found someone with more direct knowledge of the applicant and his operational working environment to testify as to the intolerability of reinstating him.

[22]In the circumstances, I think there was an insufficient evidentiary basis for the arbitrator to reasonably conclude that it would be intolerable to reinstate the applicant.

Length of absence from the workplace

[23]The second reason relied upon by the arbitrator was his conclusion that, after seven years, the workplace of the SAPS had changed so much that

he would be incapable of fitting into the new environment. The applicant contends that there was no evidence tendered in the arbitration on which the respondent could base this conclusion. The second respondent does take issue with this contention. In the circumstances, there was no reason for the applicant to have provided the entire transcript of the proceedings to demonstrate this point. In view of the absence of any material dispute on this question, it seems reasonable to conclude that the arbitrator was probably more influenced by simply the length of the lapse of time between the applicant's dismissal and the outcome of the award than by any objective finding supported by evidence that the nature of the workplace had altered so dramatically that it would not be practical to reinstate the applicant.

[24]It is unfortunate it has taken so long to reach this point, but if one considers the history, it is simply due to the parties not being able to settle the matter and choosing to litigate at every stage. Obviously, an employer must be alive to the fact that reinstatement always remains a possibility if the ultimate decision goes against it and it cannot rely solely on a long delay in finalising the litigation as a reason for denying the remedy the employee was entitled to in the first place.

[25]The SCA has also held that ***Republican Press (Pty) Ltd v CEPPWAWU & Gumede & others*** [2007] 11 BLLR 1001 (SCA), at [21]-[22], that a delay in finalising a matter does not in and of itself justify awarding compensation instead of reinstatement. In that case the court

did substitute an award of reinstatement with one of compensation, but there had been a delay of approximately six years between the dismissal of the employees and the reactivation of the case in the Labour Court, which was the fault of the union. Moreover, there had been further retrenchments since the dismissal of the affected employees who had been retrenched in that matter.

[26] In this instance the arbitrator simply assumed, without hearing evidence on the issue, that the workplace will have changed to an extent that the applicant would be unable to adjust to it.

[27] There is also nothing in the award to indicate that the arbitrator gave any consideration to the applicant's 30 odd years' of service at the time of his dismissal or weighed up the relative impact of an award of compensation or reinstatement on someone who was close to retirement.

Conclusion

[28] I am satisfied that in denying the applicant the primary remedy of reinstatement for his substantively unfair dismissal, the arbitrator reached conclusions that could not reasonably be reached on the evidence before him, even to the extent that there was no evidence before him to justify his conclusion that it would be intolerable to reinstate the applicant. He also failed to consider relevant factors such

as the applicant's length of service. Accordingly his award of compensation as an appropriate form of relief must be set aside.

Order

[29]In view of the reasoning above:

- a. The First respondent's finding that compensation of 10 months' remuneration is an appropriate form of relief is reviewed and set aside.
- b. The first respondents' finding on the appropriate relief for the applicant's unfair dismissal is substituted with an order that the second respondent must reinstate the applicant with retrospective effect including backpay until the date of his dismissal on 20 December 2004.
- c. The applicant must be issued with a written warning in respect of each of the charges 2,7 and 10 on his return to work.
- d. The applicant must be issued with a final written warning in respect of charge 12 on his return to work.
- e. The applicant must be reinstated by 6 February 2012.
- f. The second respondent must pay the applicant's costs.



ROBERT LAGRANGE JUDGE OF THE LABOUR COURT

Date of judgment: 20 January 2012

Date of hearing: 13 May 2011

Appearances:

For the applicant: E Louw

For the respondent: W R Mokhari SC, instructed by the State Attorney.

LABOUR COURT