

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

Case NO: J2033/09

In the matter between:

MADIBENG LOCAL MUNICIPALITY:

Applicant

And

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL (NORTH WEST DIVISION) 1st Respondent

COMMISSIONER MOJAKI MOSALA N.O

2nd Respondent

MAUREEN CIBE

3rd Respondent

JUDGMENT

LALLIE AJ

- [1] This is an application to review and set aside the arbitration award of the second respondent (the commissioner). In the award the commissioner found the dismissal of the third respondent, Ms Cibe (Cibe), to have been procedurally and substantively unfair and ordered her reinstatement and reimbursement.
- [2] The applicant also applied for the stay of the enforcement of the stay of the arbitration award pending the determination of this review application.

Background facts

- [3] Cibe was employed by the applicant as a legal administration officer. She was subjected to a disciplinary enquiry after Ms Sekgothe (Sekgothe) who works for the applicant as a senior clerk received a letter from Hyundai Mall Carnival, a car dealership. The letter was written on the applicant's letter heads. Its contents purported to confirm that Cibe was a legal advisor at the applicant who received a monthly unlimited travel allowance of not less than R5000.00.
- [4] Cibe was found guilty of failure to conduct herself with

honesty and integrity by representing to Hyundai Motors that she qualified for a car allowance of not less than R5000.00 by means of a forged letter purportedly from the Municipality's Finance Department. She was dismissed and challenged the fairness of her dismissal at the first respondent. The second respondent (the arbitrator) found her dismissal both substantively and procedurally unfair and reinstated her with effect from 1 August 2009. He further ordered the applicant to reimburse her an amount of R246 545.97.

The arbitration award and grounds for review.

- [5] The applicant's grounds for this review are that the arbitrator committed misconduct in relation to his duties as an arbitrator, gross irregularities in conducting the arbitration and exceeded his powers.
- [6] By agreement no evidence was led at the arbitration. The parties submitted documents and argued their respective cases. The commissioner found that contrary to section 23 of the Labour Relations Act 65 of 1996 (the LRA), the

applicant had breached the collective agreement which contains the disciplinary procedure twice. Firstly by not affording Cibe the right to appeal the decision of the chairperson of her disciplinary hearing and by suspending her in excess of the 3 months' period prescribed in the collective agreement or for a reasonable time pending her disciplinary enquiry. He found that Cibe was suspended for 2 years, a period he found unreasonably excessive.

- [7] The arbitrator further found that the applicant failed to discharge the onus of proving the fairness of Cibe's dismissal as required in section 192 of the LRA in that it provided no proof that Cibe produced the letter and misrepresented herself and the applicant. He preferred Cibe's version that she did not write the letter and she never intended to misrepresent her financial status to the dealership.

The test for review

- [9] The test for review is enunciated by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines & others* [2007] 12 BLLR 1097 (CC) as follows:

"Is the decision reached by the commissioner one that a reasonable

decision maker could not reach?”

[10] In *Relyant Retail Limited t/a Bears Furnitures v Commission for Conciliation, Mediation and Arbitration & others* reported in [2009] JOL 24327 (LC) the Labour Court found its function in considering whether or not to interfere with the arbitration award on review limited to those grounds provided for in term of section 145 of the Labour Relations Act 66 of 1995 (the LRA), as suffused by the constitutional standard of reasonableness. The reasonableness standard entails the applicant having to show that the decision reached by the arbitrator under the statutory arbitration system is one which a reasonable decision-maker could not reach.

[11] The Court explained the principle of reasonableness as follows in the *Sidumo* judgment *supra*:

“It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing ... the commissioner’s action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.”

[12] The Court in *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR (CC)

held as follows:

“It is clear, as Ngcobo J holds, that a commissioner is obliged to apply his or her mind to the issue in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.”

Analysis of the arbitration award

[13] In the analysis of evidence the arbitrator quoted the purpose of the disciplinary procedure in the main collective agreement of the South African Local Government Bargaining Council (the collective agreement). He then dealt with the question of suspension and made the following finding:

“Suspension cannot take place in vacuo. It is linked to a formal process for initiating disciplinary hearing . The employee’s suspension from 2 July 2007 does not seem to be linked to any disciplinary process. This is but one of the areas the respondent fails to explain in argument and it is material to the employee”

[14] This is but one of the many instances in which the arbitrator demonstrated his failure to apply his mind to the issue before him. Had he read the documents presented at the arbitration, he would have realized that Cibe had sated very clearly in her own heads of argument that she was suspended after allegations of fraud were made against her. His conclusion that her suspension, to use the arbitrator's words, took place *in vacuo* is unreasonable.

[15] The arbitrator made the following finding on suspension:

"The employee was suspended for a period in excess of three (3) months as prescribed by the collective agreement. The respondent does not in any way provide an explanation for this excessive suspension save to say that the employee did not challenge the suspension. Sorry, it is raised in these proceedings."

[16] The arbitrator made a finding that the applicant flouted the collective agreement by suspending Cibe in excess of 3 months without an explanation.

[17] In rejecting the applicant's argument that Cibe did not

challenge her suspension he over looked the fact that a dispute regarding the unfair suspension of an employee is governed by section 186 (2) (b) LRA. An unfair suspension constitutes an unfair labour practice. As the arbitrator has stated that the issue he had to determine was Cibe's unfair dismissal he should not have dealt with the unfair suspension dispute which falls within the jurisdiction of the Commission for Conciliation Mediation and arbitration (the CCMA).

- [18] The arbitrator's failure to identify issues which were properly before him is a clear indication of his failure to apply his mind to the issue before him.
- [19] The arbitrator further made a finding that the applicant also flouted the collective agreement by delaying the finalization of the disciplinary hearing by 2 years. This finding cannot be factually correct because the arbitrator stated in his award that Cibe was suspended on 2 July 2007 and dismissed on 4 August 2008. The delay is was about 13 months.
- [20] The arbitrator made a finding that the applicant provided no proof that Cibe produced the letter and misrepresented herself and the respondent. He concluded that the applicant

had failed to discharge the onus that her dismissal was unfair. He found that Cibe had provided him with evidence that supported the theory that she did not write the letter. He concluded that her case was credible and to be believed. He ordered her reinstatement having found her dismissal substantively and procedurally unfair.

[21] The arbitrator was presented with 2 mutually destructive versions. He rejected the applicant's version without giving reasons. Although the award has a sub-heading for analysis of evidence and arguments the arbitrator did not analyse the evidence at all. He did not disclose the evidence which forms the basis of his decision.

[22] The correct approach to deal with factual disputed is laid down by the SCA in *STELLENBOSCH FARMERS' WINERY GROUPLTD AND ANOTHER v MARTELL ET CIE AND OTHERS* 2003 (1) SA 11. It involves the making of findings on the credibility of factual witnesses, their reliability and probabilities.

[23] The arbitrator gave no reasons for finding Cibe's dismissal procedurally unfair. He therefore failed in his duty to provide brief reasons for his decision.

- [24] Having reinstated Cibe with effect from 1 August 2009 the arbitrator ordered the applicant to reimburse her an amount of R246 545.97 which is equivalent to her 11 months' salary.
- [25] Section 193 of the LRA which deals with relief for unfair dismissal does not provide for reimbursement. The arbitration award reinstating Cibe with effect from 1 August 2009 was issued on 20 July 2009. The arbitrator had no basis to grant any additional form of relief to the reinstatement as section 193 of the LRA provides that payment of compensation can be ordered as an alternative to reinstatement or reemployment.
- [26] Cibe indicated in the pre- arbitration minute that the relief she was seeking was compensation. For reasons not stated or implied in the arbitration award the arbitrator did not grant her compensation but reinstatement and reimbursement. That is not the conduct of an arbitrator who applied his mind to the issue before him.
- [27] The arbitrator granted a costs order for the postponement of the arbitration on 12 December 2008 pending the outcome of a rescission application because he found the postponement an unnecessary waste of resources intended

to frustrate the arbitration proceedings. He found the delay caused by the postponement unacceptable whatever legal argument. Not all postponements cause unnecessary delays. There was a duty on the arbitrator to consider the reasons for the postponement of the 12 December 2008 before making a determination whether it was justified or warranted a costs order against the applicant. His approach shows that he wanted to punish the applicant for the postponement irrespective of the circumstances surrounding the request for the postponement. His refusal to consider legal arguments on whether the postponement was justified rendered his decision to grant the costs order reviewable.

[28] In *Edcon Ltd v Pillemer NO & Others* [2011] BLLR 1 (SCA) after referring to *Sidomo* (supra) the SCA held as follows:

“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.”

[29] In this review application the arbitrator’s conclusion is not rationally connected to his reasons taking into account the material before him. Instead the arbitration award is awash with illustrations of the arbitrator’s failure to carry out his mandate. There is no reason why costs should not follow the result.

[24] I make the following order:

1. The arbitration award made by the second respondent on 20 July 2009 is reviewed and set aside.
2. The matter is referred to the South African Local Government Bargaining Council (North West Division) for a rehearing before another arbitrator.
3. The third respondent is to pay the costs of these proceedings.

LALLIE AJ

Date of hearing : 10 March 2011

Date of judgment : 9 June 2011

Appearances:

For the Applicant: Adv Molapo

Instructed by: Mmamahlola Rabnyana Attorneys

For the Third Respondent: Mr M J Gouws

