

LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

Case: JR 2595/09

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS

UNION obo C MAHLANGU

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

MPAHLANI J (N.O.)

Second Respondent

GERT SIBANDE DISTRICT MUNICIPALITY

Third Respondent

JUDGMENT

LAGRANGE, J:

- ¹] This matter concerns a review application to set aside the findings of the second respondent, the arbitrator, that Mr C Mahlangu's dismissal by the third respondent on 2 October 2007 was substantively and procedurally fair.
- ²] Mr Mahlangu ('Mahlangu') was dismissed after the employer decided not to accept the recommendation of the chairperson of the disciplinary enquiry. His recommended sanction was that Mahlangu be dismissed, but the sanction be suspended for a period of 12 months, provided the employee was not found guilty of similar misconduct during that period. The recommendation was not to the employer's liking and it decided instead to summarily dismiss Mahlangu.
- ³] A dispute over the fairness of the dismissal was referred to the bargaining Council and the award following that referral was taken on review. On 3 February 2009, this court set aside the original award and referred the matter back for a fresh hearing before another Commissioner. On the second occasion, the parties agreed to present a stated case to the arbitrator, in which the main issues in contention were raised. On 11 August 2009, the second arbitrator handed down his award.

The relevant facts

- 4] It is not necessary for the purposes of this judgement to restate all the agreed facts recorded by the parties, but the salient ones are mentioned below.
- 5] The parties were bound by a collective agreement, part of which set out the procedures to be observed at disciplinary hearings. The applicant was charged with two counts of misconduct: the first of acting in an improper manner, and the second for disruptive behaviour. Although it was not part of the facts set out expressly in the stated case, it appears to be common cause that the charges arose out of an incident in which Mahlangu allegedly displayed gross disrespect, uttered rude and abusive language to the municipal manager and further made aggressive advances towards the same manager, in the course of which he humiliated the manager in front of staff and junior employees. The second charge was that he disrupted the functioning of the municipality by blocking the venue for the sitting of a mayoral meeting and blocked free access of the public to the reception area of the municipal premises. At the time of the hearing the applicant had been employed by the municipality seven years and had a clean disciplinary record.
- 6] The chairperson of the internal disciplinary enquiry, Mr Sibeko ('Sibeko'), found Mahlangu guilty of the charges and issued the recommended sanction of suspended dismissal described above. The municipality sought clarity on aspects of the chairperson's ruling, without advising the applicants until after it had received the chairperson's response. The full scope of the municipality's enquiries is not entirely clear, but from the chairperson's written reply it seems the principal enquiry directed to him was to provide clarity on the criteria which he had used in formulating his recommended sanction. On 18 September 2007 the municipality's attorneys sent a copy of the chairperson's response to the applicant's union. This was the first time the applicants were made aware of communications between the employer and the chairperson.
- 7] In his response to the employer's enquiries, the chairperson stated, amongst

other things, that :

"Before dealing with the questions raised by the Municipality, I wish to state that my sanction is merely a recommendation to the municipality."

"The municipality has got the right to deviate or not to deviate from the recommended sanction."

"In other words it's up to the municipality to accept the recommended sanction or not. It may substitute the recommended sanction with a sanction that it deems fit."

- 8] The municipality then advised the applicant that he would be summarily dismissed with effect from 2 October 2007, without affording him a further opportunity to be heard before it took this decision.

The arbitrator's award

Substantive fairness

- 9] In deciding that the applicant's dismissal was substantively fair, the factors set out below weighed heavily with the arbitrator.
- 10] Firstly, the arbitrator found it was of the utmost importance that the presiding officer had an unrestricted choice of sanction because the collective agreement provided that he could choose, *amongst* other things, any of a

number of specified sanctions. Secondly, he held it was clear that the chairperson chose not to impose a sanction but rather to recommend one. In this regard, the arbitrator found it noteworthy that the power of the chairperson to impose any sanction derived from the employer-employee relationship.

^{11]} Having made these observations the arbitrator continued:

"The exception to the aforesaid [i.e. that the chairperson's power derived from the employer-employee relationship^{1]} would be in instances where the independent or external disciplinary hearing chairperson has been specifically given such disciplinary powers upon or during his appointment, i.e. powers to impose discipline or any disciplinary sanction rather than a recommendation.

In the present matter, there is neither an argument nor an explanation that Mr Sibeko was given specific powers to impose discipline or sanction, hence I am of the view that Sibeko can only recommend a sanction and such recommendations can either be accepted or rejected by the respondent."

^{12]} The arbitrator then considered the applicants' argument that the dismissal was unfair because the collective agreement had not been followed in the sense that the chairperson's determination should have been final and binding in terms of the disciplinary procedure.² The arbitrator dispensed with this argument, citing the well-established principle that a failure to follow an agreed procedure does not necessarily render a dismissal unfair.³ The arbitrator also took into account the principle that, merely because a disciplinary procedure deems an internal appeal to be final and binding, it does not mean if an appeal is unsuccessful, an employee is precluded from

¹ My annotation.

² See the citation of Clause 9.4 of the disciplinary procedure in paragraph [22] of the judgment.

³ See **Highveld District Council v CCMA & others [2002] 12 BLLR 1158 (LAC)** at 1161, par[15].

pursuing the matter further using the statutory dispute resolution procedures of the LRA. It is a little unclear why the arbitrator felt it necessary to make this point, but it appears that he was trying to emphasise that strict compliance with disciplinary codes is not necessarily an indicator of unfairness. In this instance, the employee did not make use of the internal appeal process.

^{13]} The arbitrator endorsed the sanction of dismissal imposed by the employer, taking account of the seriousness of the charges on which the employee had been found guilty and of the provisions of the code, which had a bearing on the evaluation of misconduct in his view.

Procedural fairness

^{14]} The applicant had challenged the procedural unfairness of his dismissal on the basis that he ought to have been given a hearing prior to the employer imposing the sanction of dismissal. The arbitrator dismissed this claim. He found that before the chairperson of the internal enquiry made his recommendation both parties had an ample opportunity to present mitigating and aggravating circumstances. Secondly, he found the applicant had not advanced any authority for the proposition that he was entitled to another hearing before the employer imposed the final sanction of dismissal.

^{15]} Lastly, the arbitrator decided that there was nothing procedurally unfair about the employer imposing its preferred sanction, because this was not an alteration of the chairperson's sanction: the chairperson had made it unequivocally clear that he had merely made a recommendation and it was up to the employer whether to accept his recommendation or not.

Grounds of Review

16] The applicants attack both the substantive and procedural findings of the arbitrator.

17] They claim that the arbitrator acted unreasonably in reaching his conclusion that the dismissal was substantively fair because the collective agreement, in terms of which the chairperson of the enquiry was acting, not only conferred the power to impose a sanction on him but also obligated him to do so. For this reason, the arbitrator failed to apply the very exception which he himself had identified, namely that the power to impose a sanction flowed from the employer-employee relationship *unless* specific powers had been given to the chairperson to impose a sanction.

18] Expanding on this ground of review in its heads of argument, the applicants make reference to the terms of the disciplinary procedure. The disciplinary procedure is a collective agreement concluded under the auspices of the SALGBC. In terms of clause 1.1 of the agreement, employers and employees falling within the scope of the Council are obliged to comply with its terms. Not only is it binding as a collective agreement, but clause 4.2 of the code states: *"The code is a product of collective bargaining and the application thereof is peremptory and is deemed to be a condition of service"* (emphasis added).

19] Clause 6.3 of the agreement provides that the municipal manager or representative may establish a disciplinary tribunal to conduct an enquiry where the misconduct might result in suspension, termination or dismissal. Clause 6.4.1 states:

"The Municipal Manager or his authorised representative shall constitute a disciplinary tribunal by appointing a suitably qualified person to serve as the

presiding officer. In general a person appointed to serve as the presiding officer should be a senior employee in the employee of the employer. However, if this is not possible or desirable, any other suitably qualified person may be appointed."

20] clause 7.1 provides that the hearing should be conducted by the presiding officer and clause 7.5 provides that the presiding officer shall have the power, amongst other things, to:

"7.5.6 make a finding of fact after having considered the evidence;

7.5.7 correct and hear any plea in mitigation, aggravation or extenuation prior to deciding on a sanction to impose; and

7.5.8 impose, inter-alia, any of the following sanctions:

7.5.8.1 written warning;

7.5.8.2 final written warning;

7.5.8.3 transfer to another position either with or without financial loss;

7.5.8.4 suspension without pay for a maximum of ten (10) days as is furthermore referred to in clause 2.5.3 of annexure "A" hereto;

7.5.8.5 the withholding of any salary increment for a period not exceeding 12 months;

7.5.8.6 demotion to another post with or without financial loss; or

7.5.8.7 dismissal."

(emphasis added)

21] Further, clause 7.6 states:

"The Presiding Officer shall within ten (10) days of the last day of the hearing confirm in writing the findings of fact, sanction imposed and the reasons in support thereof and provide a copy of the determination to the Municipal Manager or his representative and to the employee is representative."

(emphasis added)

22] Clause 9 of the procedure deals with further matters relating to the disciplinary tribunal. Clause 9.1 states that "in general" the presiding officer should be a senior employee but if not possible or desirable any other suitably qualified person. Clause 9.3 prohibits the presiding officer from consulting, conferring, or having any casual contact with any of the parties or their representatives while handling a matter without the presence of consent of the other party. Importantly, clause 9.4 reads:

"The determination of the disciplinary tribunal shall be final and binding on the employer save that the employee may lodge an appeal thereto."

23] Although the applicants speak of the chairperson's recommendation on the issue of sanction as 'a finding', it is apparent that he did not believe he was making a final determination, but a recommendation. He certainly did not

make a determination in the sense meant by clause 7.6 of the procedure. The employer seized on the chairperson's incomplete conclusion and relied on his subsequent clarification to assume the power to determine the sanction itself.

24] I agree with the applicants that this appears to be precisely the kind of case which the arbitrator himself identified as one in which the chairperson has been given specific powers to impose a sanction in terms of a disciplinary code that is binding on the employer and employee parties. Not only that, but clause 4.2 makes it clear the code was not intended to be a guideline but was intended to be binding as part of the employee's contract of service and that its provisions were mandatory. In failing to apply his own test to the facts of the matter before him, the arbitrator clearly failed to act reasonably.

25] The arbitrator relied on the broad choice of sanction afforded to the arbitrator to support his conclusion that this also entailed the power to make a recommendation instead. It is true that clause 7.5 of the code permitted the chairperson a reasonably wide choice of sanction, but each one of the measures listed in the section is unequivocally a sanction that could only be imposed after a finding of guilt. There is nothing in the wording of that section to suggest the chairperson was also given the discretion to merely recommend a sanction. Remarkably, the arbitrator then makes the sweeping assertion that he was not referred to any authority that the arbitrator was given any powers to impose discipline or sanction. This statement is completely at odds with the applicants' heads of argument submitted at the arbitration hearing which pertinently drew his attention to the provisions of the collective agreement. This demonstrates a complete disregard on the part of the arbitrator of those submissions, which were directly relevant to the issues before him, and renders his conclusion on the issue of substantive fairness unreasonable.

26] The applicants submit that the arbitrator's finding of procedural fairness was

also unreasonable because the arbitrator *was* in fact referred to authority that the applicant was entitled to a hearing before the sanction was altered, but he ignored it and failed to give effect to it. The applicants referred in paragraph 15 of their heads of argument to the case of ***Telkom SA v CCMA & Others (2002) 23 ILJ (LC)***, in which the court confirmed an arbitrator's finding of procedural unfairness, in part because the employee was not given an opportunity (presumably to make representations) in an in-house conciliation meeting, which was held after a sanction had already been imposed, following which a more serious sanction was imposed.⁴ I agree that, in the circumstances of this matter, Mahlangu should at least have been given an opportunity to make further representations to the employer before it imposed a harsher sanction than the chairperson was prepared to recommend.

Re-evaluation of procedural and substantive fairness

^{27]} A reading of the provisions of the collective agreement cited above makes it clear, in my view, that the parties to the agreement had jointly decided that disciplinary hearings would be conducted by a specially appointed tribunal on each occasion and that tribunal would be exclusively charged with the task of making findings of fact and determining a sanction if any. No provision is made in the agreement for anyone other than the appointed presiding officer to determine these issues.

^{28]} The only role provided for another level of management to play a part in the final outcome of any disciplinary proceeding is in the event that the employee

⁴ At 539, paras [14] – [15]

appeals against a disciplinary sanction given by the chairperson of the disciplinary enquiry. This appeal is provided for in clause 14 of the procedure. In relation to the appeal procedure it must be mentioned that the code contains specific provisions for the appointment of a presiding officer to conduct the appeal. It is also relevant to note that only an employee may lodge an appeal. The employer has no recourse in terms of the procedure if it is unhappy with the outcome of the disciplinary enquiry.

29] What happened in this case is that the chairperson of the enquiry did make a finding on Mahlangu's guilt on the charges but failed to complete his duties under the code by finalising the sanction. Instead, he contented himself with only making a recommendation to the employer. There is nothing in the agreement to suggest that the powers given to the chairperson included the power to delegate or re-assign his responsibility to decide a sanction to another party.

30] The employer also did not invite any representations from the applicants before it decided to take up the chairperson's invitation to determine the sanction itself. As this was clearly a departure from the agreement, it might reasonably be expected that it would not have assumed this power without obtaining the applicant's consent for such a material deviation from the agreement. But it did not. In deciding to perform the function which was entrusted to the chairperson, the employer acted in direct breach of the disciplinary procedure and exercised a power it was not entitled to exercise in terms of that procedure. The fact that an employer is responsible for and entitled to take disciplinary action does not mean that it can simply reclaim powers to determine guilt and sanction which it has previously relinquished in terms of a binding agreement that remains applicable to it. The facts of this case are also distinguishable from the case of **Samson v Commission for Conciliation, Mediation & Arbitration & Others (2010) 31 ILJ 170 (LC)**, in which there was no collective agreement and there was a well established

practice of reviewing disciplinary sanctions internally.⁵

31] What the employer ought to have done was to point out to the chairperson that he was obliged to make a decision on the sanction as well in terms of the code, and to ask him to do so. In any event, the employer was well aware that the chairperson did not think that the sanction of dismissal was appropriate. Instead of giving effect to his plain wishes, it substituted it with a more severe sanction, which it was not entitled to do under the binding provisions of the code.

32] Under circumstances in which the employer unilaterally assumed the power to determine the sanction to be imposed whereas it was bound by an agreed peremptory code assigning such power to an appointed chairperson, and where it did not give effect to the sanction recommended by the only person entitled to decide on it, the employer's dismissal of Mahlangu was in flagrant breach of the provisions of the code, which did not allow it to determine if a fair reason existed for his dismissal. Its action had the effect of the sanction being decided by someone other than the only person authorised by the code to do so. Had the employer acted correctly and reaffirmed the chairperson's obligation to finalise the imposition of a sanction, there is no reason to believe the chairperson would not have imposed the sanction he had recommended. Accordingly, there is every reason to believe the dismissal would not have occurred, had the employer not acted as it did. Thus it seems the most appropriate remedy is to give effect to the chairperson's recommendation.

33] If the employer was unhappy with the sanction the chairperson would have imposed, it would not have been without recourse: it could have applied to review the chairperson's decision.⁶

⁵ At 177, par [11]

⁶ See *Member of the Executive Council for Finance, Kwazulu-Natal & another v Dorkin NO & another* (2008) 29 ILJ 1707 (LAC).

34] The fact that Mahlangu and his representatives were unaware of the exchange between the chairperson and the employer until after the fact, and had no opportunity to make any representations to the actual decision maker - albeit one who had usurped the chairperson's function - on the validity of the chairperson's views on recommending a sanction, nor to make representations whether any different sanction could, or should, be imposed, was procedurally unfair. It was also a breach of clause 9.3 of the code. Accordingly, I am satisfied that the applicant's dismissal was also procedurally unfair.

Order

35] In the light of the above, the following order is made:

- a. The arbitrator's award issued on 11 August 2009 under first respondent's case number MPD 110710 is reviewed and set aside.
- b. The arbitrator's findings are substituted with a finding that Mr C Mahlangu's dismissal on 2 October 2007 was procedurally and substantively unfair.
- c. The third respondent must reinstate the applicant with retrospective effect, including backpay, to the date of his dismissal, within 14 calendar days of this judgment being handed down.
- d. Mr C Mahlangu is reinstated subject to:
 - i. A disciplinary finding that he was guilty of two charges of misconduct, namely that he had acted in an inappropriate manner and had behaved disruptively on or about 29 May 2007;

ii. A suspended sanction of dismissal for the above misconduct, which sanction will last for a period of 12 months from the date of his return to work;

iii. On being found guilty of one or more of the same or similar offence during the twelve month period, he may be dismissed in terms of the suspended sanction.

e. No order is made as to costs.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 14 September 2010

Date of judgment: 21 June 2011

Representation

For the applicants: C Orr instructed by Cheadle, Thompson & Haysom

For the Respondents: L P Mkize instructed by Twala Attorneys

For the Applicants:

For the Amicus Curiae:

For the First and Second Respondents:

For the Third Respondent:

Advocate W Trengove SC and Advocate N Fourie instructed by the Centre for Applied Legal Studies / Wits Law Clinic and the Freedom of Expression Institute Law Clinic.

Advocate G Marcus SC and Advocate A Stein instructed by Bowman Gilfillian Attorneys.

Advocate PM Mtshaulana SC and Advocate K Pillay instructed by the State Attorney.

Advocate R Moultrie and Advocate MS Baloyi instructed by the Legal Resources Centre.