

**LABOUR COURT OF SOUTH AFRICA**  
**(HELD AT BRAAMFONTEIN)**

**Case: JR 747/10**

**In the matter between:**

**NGWATHE LOCAL MUNICIPALITY**

**Applicant**

**and**

**SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING  
COUNCIL**

**First Respondent**

**A. V LEKOTHA (N.O.)**

**Second Respondent**

**SAMWU obo S. MOSOEU**

**Third Respondent**

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**JUDGMENT**

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**LAGRANGE, J:**

Although the third respondent did file a notice of opposition, no answering affidavit was filed and neither the third respondent nor his attorneys attended court when the matter was set down to be heard.

The applicant municipality seeks to review and set aside an arbitration award in favour of the third respondent in terms of which the arbitrator had found the latter's dismissal by the applicant was procedurally fair but substantively unfair and had awarded his reinstatement. The award was issued on 11 on March 2010.

The third respondent was a sub-accountant, who had been dismissed together with his supervisor after being found guilty of breaching the Code of Conduct for Municipal Staff Members contained in a Schedule to the Municipal Systems Act in that they were found guilty of being parties to fraud, corruption and bribery, and/or falsification of records as well as gross negligence. Essentially, they had been found guilty of unprocedurally cancelling cash receipts issued to ratepayers paying for municipal services in cash. In consequence, there was a shortfall of cash accounted for in excess of R 2,500-00.

The arbitrator found that the employer had failed to discharge the onus of proof, citing the following reasons:

- a. The fact that there was evidence that some employees had complied with the proper procedure for cancelling receipts did not prove that the applicant himself was made aware of the entire procedure.

Secondly, there was no conclusive evidence linking the applicant's specifically to

the cancelled receipts in question. The arbitrator reasoned that it was established that the system only allowed one cashier to sign for all transactions performed by all the various cashiers at the end of the day and there was also a practice for cashiers to share their pin codes among themselves. The arbitrator reasoned that it was insufficient for the employer to say that merely because the applicant was part of a team responsible for the transactions that he should shoulder the blame for them.

The applicant attacks the award on the basis that in reaching his conclusion the Commissioner had failed to have regard to material facts which rendered the arbitration proceedings unfair in principle because it prevented both parties having their cases fully and fairly ventilated, thereby committing a gross irregularity in the conduct of the arbitration proceedings in terms of section 145(2)(a)(ii) of the LRA. In taking this approach the applicant relies on the dictum of Ngcobo J in the *Sidumo* case in which the learned judge held that such an irregularity justified setting aside an award not because of the result but because the irregularity affected the conduct of the arbitration proceedings.<sup>1</sup>

In this matter, the applicant argued that the arbitrator ignored the following relevant evidence: in evaluating whether or not the third respondent was aware of the procedures for cancelling receipts the arbitrator failed to have regard to the

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<sup>1</sup> *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) at 2491, para [268]

fact that the evidence showed that he had in fact received the checklist of controls, and that at least on one occasion it was shown that the third respondent had followed the correct procedure.

Secondly, it claims that the arbitrator ignored the fact that there was evidence that he only shared a pin code with one other person and that other employees had their own.

I agree that, on the face of the award, the evidence mentioned does not appear to have registered with the arbitrator in his evaluation of those two issues. The evidence mentioned is significant enough in relation to the conclusions which he drew to at least have warranted an explanation of why he discounted it. I am satisfied that the applicant is justifiably aggrieved that the arbitrator did not give it a fair hearing in the light of his silence on this evidence. Accordingly, the award stands to be set aside on review not on grounds of unreasonableness but on grounds of the irregularity in the process identified by Ngcobo J, above.

## **Remedy**

If the record of the oral evidence was complete, it would be possible for the court to substitute its own finding for that of the arbitrator. Regrettably more than half the record is merely a reconstruction based on the arbitrator's terse notes. In the

circumstances, it would not be fair to either party for the court to attempt to determine the matter on the record available, and the most practical though undeniably less expeditious solution is to remit the matter back to the first respondent for a hearing *de novo*.

## **Order**

In the light of the analysis above:

- b. The second respondent's arbitration award issued on 11 on March 2010 under case number FSD 100715 is reviewed and set aside.
- c. The matter is remitted back to the first respondent, which is directed to set the matter down before another arbitrator other than the second respondent for a *de novo* arbitration hearing.
- d. No order is made as to costs.

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