



REPUBLIC OF SOUTH AFRICA

Not reportable

Not of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 202/10

In the matter between:

K J LISANYANE

Applicant

and

C J WESSELS N. O

First Respondent

S.A POLICE SERVICES

Second Respondent

SAFETY AND SECURITY SECTORAL

BARAGIANG COUNCIL

Third Respondent

Heard: 26 January 2012

Delivered: 11 October 2012

Summary:

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside the arbitration award made by first respondent (the arbitrator) under case number PSSS 210-08/09 dated 17 July 2009. In terms of the arbitration award, the arbitrator found the dismissal of the applicant to have been both substantively and procedurally fair and accordingly the applicant's claim that he was unfairly dismissed fell away.
- [2] This application is accompanied by a condonation application for the late filing of the review application. The reason for the delay is according to the applicant because he only came to know about the outcome of the arbitration hearing long after the arbitration award was issued. The reason for this was because the union official did not inform him on time about the arbitration award. After being advised of the outcome of the arbitration award, the applicant kept enquiring about what was happening about the matter from the person who represented him. At some point that person informed him that matter was taken from him and was given to another union official Mr Sechele. Mr Sechele informed the applicant when he finally managed to contact him that he did not know anything about his matter. From there on he was sent from pillar to post by the union regarding what was happening to his matter.
- [3] The law and the principles governing the consideration of condonation are well known in our law. There is no need to repeat them same in this judgment. In my view the applicant has shown good cause which warrants the granting of condonation.
- [4] The background facts of this case are in general common cause. The applicant who was employed as station commissioner and cluster commander, was charged and dismissed for the following offences:

'In terms of Section 40 of the South African Police Act, 1995, read with the South African Police Services Regulations of 2006, you are charged with misconduct in that you allegedly contravened Regulation 20 (c) of the said regulations at between 23h00 near Wolmanstad, [in that] you used the property of the State without permission namely Toyota Corral with registration FS 416 NW.'

[5] The applicant was found guilty and fined R300.00 suspended for a period of six months. The applicant was unhappy with the outcome of the disciplinary hearing and accordingly appealed against that decision. He thereafter launched an internal appeal against that finding. The chairperson of the internal appeal upheld the decision of the chairperson of the disciplinary hearing but imposed a different sanction. The chairperson of the disciplinary appeal ordered that applicant be dismissed.

[6] The matter was then referred to the SSSBC for arbitration. The arbitrator upheld the decision of the appeal and thus confirmed the dismissal of the applicant. It is the outcome of that arbitration award that is the subject of the present review application.

[7] The facts which gave rise to the charges against the applicant are set out in the arbitrator's award and have not been challenged by any of the parties. It is common cause that at the time of his dismissal the applicant who was the station commissioner and cluster commander at Wolmaranstad had been in the employ of the second respondent for a period of just under 20 years.

[8] The applicant was during February 2007 involved in an accident whilst driving the second respondent's vehicle. At the time the applicant was resident at a guest house in Wolmaranstad whilst his family was at Tweespruit. The accident occurred on the Makwasie/Wolmaranstad road.

[9] As would appear from the charge quoted above the applicant was charged with unauthorized use of the state vehicle. The applicant was found not guilty for other charges concerning the allegations that he intentionally and or negligently damaged or caused loss to the state property.

Grounds for review

[10] The applicant contends that the arbitration award is reviewable because it suffers from the defects envisaged in section 145 of the Labour Relations Act 66 of 1995, in that the arbitrator committed a misconduct or alternatively exceeded his powers. In this respect, the applicant contends that the arbitrator flagrantly disregarded the provisions of the regulation 17 of the

Regulations promulgated in terms of the South African Police Service Act 68 of 1995 which set out the powers of the appeals authority. The relevant sub-regulations of Regulation 17 for the purposes of this judgment reads as follows:

‘(7) The appeals authority-

(a) Uphold the appeal; or reduce the sanction to any lesser sanction allowed in terms of regulation 15(1); or

(b) Reduce the sanction to any lesser sanction allowed in terms of regulation 15(1);

(c) or confirm the outcome of the disciplinary hearing.’

The arbitrator’s award

[11] The first critical finding of the arbitrator is that he did not have the authority to pronounce on whether the applicant’s ‘appeal Authority had the power to impose a more severe penalty than that imposed by the chairperson of the disciplinary enquiry as that is not the issue in dispute.’ After rejecting the evidence of the applicant on the basis that he (the applicant) was not a credible witness, the arbitrator found the applicant guilty and ordered that he be dismissed.

[12] As concerning procedural fairness, the arbitrator accepted that the period of nine months lapsed before the applicant was informed of the decision to proceed with the disciplinary inquiry. However, the arbitrator found that the failure to comply with the regulation concerning the time frame stipulated therein was not unfair because the, ‘Disciplinary Regulations and codes are guidelines and in my view deviations under certain circumstances are permissible.’

Evaluation

[13] The second respondent (the SAPS) in opposing the applicant’s application did not file any answering affidavit but based its defence on what is stated in the heads of argument. The applicant also relied on the arbitrator’s award and not on the transcript of the arbitration proceedings.

[14] There are several cases that have dealt with the issue of the binding effect of disciplinary codes that have been or not been incorporated into the contract of employment. The general approach that the courts have adopted is that an employer may deviate from the provisions of the disciplinary code where such a code has not been incorporated into the contract of employment. The disciplinary code in that regard is regarded as being a guideline from which an employer may in certain circumstances deviate from.

[15] In *Highveld District Council v Commission for Conciliation Mediation and Arbitration and Others*,¹ the Labour Appeal Court in dealing with the situation where the employer had failed to comply with the provisions of the disciplinary code held that:

‘Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will ordinarily go a long way towards proving that the procedure is fair as contemplated in s 188(1)(b). The mere fact that a procedure is an agreed one does not, however, make it fair. By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed was unfair.

When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all the circumstances the procedure was fair.’²

[16] In *Denel (Pty) Ltd v Vorster*,³ the Supreme Court of Appeal held that the provisions of the disciplinary code were binding on the employer because they were incorporated into the contract of employment. The SAPS contended that *Denel* was distinguishable from the present in that the wording of the disciplinary code in that case was peremptory.

[17] SAPS’s contention that it was entitled to reverse the decision of the chairperson and impose a harsher sanction is based on the authority

¹ (2003) 24 ILJ 517 (LAC).

² *Highveld District Council* at para 15.

³ 2004 (4) SA 481 (SCA).

Ekhuruleni Metropolitan Municipality v Mashazi and Another,⁴ and *BMW (South Africa) (Pty) Ltd v Van der Walt*.⁵

- [18] In *Mashazi's* matter, the court dealt with the review concerning the appropriateness of the sanction imposed by the chairperson of the disciplinary hearing. The facts of that case are distinguishable from the present case. In that case, an official of the municipality had been found guilty of fraud but a lesser sanction was imposed by the chairperson of the disciplinary inquiry, an independent attorney. The attorney had during the cause of the disciplinary proceedings attended a meeting with the accused employee and promised him that he would impose a lenient sanction.
- [19] The issue before the court was whether the municipality as an employer could review its decision arising from a disciplinary inquiry. The employee contended that the municipality as an employer could not review the decision of the chairperson of the disciplinary hearing whereas the municipality on the other hand contended that it was entitled to do that because the decision of the chairperson of the disciplinary hearing constituted an administrative act.
- [20] In dealing with the issue of whether the state as an employer could review its decisions concerning disciplinary matters the court referred to its decision in *MEC for Finance (KZN) and another vs Dorkin and Another* under case number D505/2002, where it had found that the State as an employer could not review its own decisions in terms of section 158(1)(h) of the Labour Relations Act of 1995. That decision was overturned on appeal in *Member of the Executive Council for Finance, KwaZulu - Natal and Another v Dorkin NO and Another*,⁶ where Labour Appeal Court held that in the case of a State entity, as a general principle, it was in the public interest that the State as an employer, should be able to reverse a sanction incorrectly imposed.
- [21] The court found that the decision in *Member of the Executive Council for Finance, KwaZulu – Natal* had been overruled by the Constitutional Court in

⁴ (2010) 31 ILJ 614 (LC).

⁵ (2000) 2 BLLR 121 (LAC).

⁶ (2008) 29 ILJ 1707 (LAC).

Chirwa v Transnet Ltd and Others.⁷ And in dismissing the review application the court reasoned as follows:

'It would appear that the LAC was not referred to the judgment of the Constitutional Court in *Chirwa v Transnet Ltd and others* (2008) 29 ILJ 73 (CC) which was delivered on 28 November 2007 which was approximately three weeks before its decision. *Chirwa* conclusively decided that the decision to dismiss an employee, even when taken by an organ of State, does not amount to administrative action that is reviewable, either in terms of s 33 of the Constitution or the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The Court held that it was no longer necessary to treat public sector employees differently and subject them to the protection of administrative law. There was no longer a distinction between private and public sector employees under our Constitution. There was no reason in principle why public sector employees who fall within the ambit of the Act should be treated differently from private sector employees and be given more rights than private sector employees. I am of the view that the fact that Ngcobo J held in *Chirwa* that a decision to dismiss a civil servant involves the exercise of a public power is of no moment, since it does not follow that such decision constitutes administrative action that is reviewable in terms of the Constitution or PAJA.'⁸

[22] The court further held that:

'The review application was brought in terms of s 158(1) (h) of the Act. It is clear from the authorities cited above that no other cause of action on which to build a review exists in our law. This conclusion was endorsed in *Transman (Pty) Ltd v Dick and another* (2009) 30 ILJ 1565 (SCA) where it was held inter alia that there was no need to permit a challenge based on the judicial review in employment dismissals. See also *Kriel v Legal Aid Board* (2009) 30 ILJ 1735 854 (SCA); [2009] 9 BLLR 854 (SCA) and *Makambi v MEC, Department of Education, Eastern Cape Province* (2008) 29 ILJ 2129 (SCA); [2008] 8 BLLR 711 (SCA).'⁹

⁷ (2008) 29 ILJ 73 (CC).

⁸ *Mashazi* at para 32.

⁹ *Mashazi* at para 35.

- [23] In the *BMW* matter, the court held that an employer has a right to subject an employee to a second disciplinary enquiry on the same issue in respect of which he has already been found guilty and has had a sanction imposed upon him when 'it is, in all the circumstances, fair to do so'.¹⁰ However the Labour Appeal Court in *Dorkin* further held that:

'[i]t would probably not be considered to be fair to hold more than one disciplinary enquiry save in exceptional circumstances" that cannot be absolute as there may be exceptional circumstances in which every reasonable person would agree that senior authorities in an organization, particularly a government department, must be able to intervene to reverse a decision on sanction reached by a chairman of a disciplinary enquiry who has been appointed by them. A good example in this regard is whether the decision reached by the chairman of the enquiry has been induced by corruption. In the public interest this had to be so. However, the courts will have constantly to endeavour to ensure that the right of senior authorities in such an organization to reverse or approach a court to reverse such a decision on sanction.'¹¹

- [24] It is clear that the court in the *BMW* matter was dealing with an issue slightly different to that in the present instance. In that case, the court pronounced on the issue of whether an employer was entitled to subject an employee to a second disciplinary enquiry on the same issue in respect of which he has already been found guilty and has had a sanction imposed upon him or her. Even then it is apparent that the court in that case did not pronounce as a rule of law that the employer was entitled as a matter of course to subject an employee to the second disciplinary hearing.

- [25] SAPS further distinguished the decision in *SAMWU obo Mahlangu v SALGBC and Others*,¹² from the present case on the basis that the provisions of the disciplinary code in that case were peremptory. In that case the court per Lagrange J in dealing with a situation where the employer had failed to

¹⁰ *BMW* at para 12.

¹¹ *Dorkin* at para 13.

¹² [2011] 9 BLLR 920 (LC).

comply with the peremptory provisions of the disciplinary code had the following to say:

'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.'¹³

[26] The court further held that:

'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.

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.'¹⁴

[27] It is common cause that the SAPS's disciplinary regulations are a product of the agreement reached between the parties to the Safety and Security Sectoral Bargaining Council ("SSSBC). The agreement concluded at the SSSBC were promulgated into regulations by the Minister in terms of section

¹³ *SAMWU obo Mahlangu* at para 27.

¹⁴ *SAMWU obo Mahlangu* at paras 32 and 33.

24 of the South African Police Service Act 68 of 1995 (the Act). Section 24 of the Act gives the Minister the power to promulgate regulations regarding amongst others:

- ‘(f) labour relations, including matters regarding suspension, dismissal and grievances;
- (g) (i) the institution and conduct of disciplinary proceedings or inquiries;
- (ii) conduct by members that will constitute misconduct;
- (iii) the provisions, if any, of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), that shall apply mutatis mutandis to disciplinary proceedings or inquiries under this Act;
- (iv) the attendance by a member or any witness, of such disciplinary proceedings or inquiries;
- (v) the circumstances under which such disciplinary proceedings or inquiries may be conducted or proceeded with in the absence of the member accused of misconduct or affected by such an inquiry;
- (vi) the hearing and submission of evidence at such disciplinary proceedings or inquiries;
- (vii) competent findings and sanctions in respect of such disciplinary proceedings or inquiries; and
- (viii) review and appeal in respect of such disciplinary proceedings or inquiries.”

[28] It would seem SAPS’s case is that the regulations are not peremptory because the Minister has discretion whether to promulgate them or not. It would also appear that it is also on this basis that SAPS argues that the regulations are not peremptory but serve as a guideline in dealing with disciplinary matters and can therefore not be enforced contractually. In this

respect SAPS relied on the decision in *Lamprecht and Nissan SA (Pty) Ltd v McNeillie*,¹⁵ where the court held that:

‘On the face of it the guidelines also do not evince any contractual intent in spite of the use of the word “right”. Its use in its setting refers to the rights created by the Labour Relations Act and not to contractual rights.’

- [29] In my view, the issue of the Minister exercising discretion is relevant up to the point before the promulgation of the regulations under section 24 of the Act. The only issue that may arise once the collective bargaining agreement has been promulgated into regulations is whether such discretion has been properly exercised, which has not been raised as an issue in the present case.
- [30] In the present case, the issue which the arbitrator had to decide was both the procedural and substantive fairness of the dismissal. In my view, it is correctly submitted on behalf of the applicant that it followed logically that the arbitrator had to determine the fairness of the appeal authority substituting the finding of the chairperson of the disciplinary hearing with a more severe sanction of dismissal.
- [31] The question that then arises is whether the finding by the arbitrator that he did not have the power to pronounce on whether the applicant's ‘appeal Authority had the power to impose a more severe penalty than that imposed by the chairperson of the disciplinary enquiry as that is not the issue in dispute,’ constitutes a gross irregularity justifying interference with the arbitration award.
- [32] In dealing with the issue of gross irregularity in *Sidumo*,¹⁶ Ngcobo J in the often quoted passage had the following to say:

‘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

¹⁵ [1994] 11 BLLR 1 (AD) at 5 G.

¹⁶ *Sidumo v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

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.'

[33] The above approach was followed by the Labour Appeal Court in the recent cases of *Gaga v Anglo Platinum Ltd and Others*,¹⁷ *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration and Others*¹⁸ and *Herholdt v Nedbank Ltd*.¹⁹

[34] In the *Gaga* matter, Murphy AJA, in dismissing the appeal where the commissioner had found the employee not guilty of sexual harassment held that:

'Where a commissioner fails properly to apply his mind to material facts and unduly narrows the inquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determine the case before him. The ensuing decision inevitably will be tainted by dialectical unreasonableness (process-related unreasonableness), characteristically resulting in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness). There will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of a decision. If a commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable. *The flaw in process alone will usually be sufficient to set aside the award* on the grounds of it being a latent gross irregularity, permitting a review in terms of section 145(1) read with section 145(2)(a)(ii) of the LRA'²⁰

[35] In my view, the submission on behalf of SAPS is incorrect in equating the provisions of regulation 17 to guidelines or as being contractually unenforceable. The validity of the regulation has not been challenged. It can therefore be safely concluded that the regulation forms part of subordinate

¹⁷ (2012) 33 ILJ 329 (LAC).

¹⁸ (2012) 33 ILJ 1381 (LAC).

¹⁹ (2012) 33 ILJ 1789 (LAC).

²⁰ *Gaga* at para 44.

legislation and consequently derives its legal force from the empowering provisions of section 24 of the Act. In the absence of a provision to the contrary the provisions of the regulation cannot be equated to a guideline which SAPS may disregard or deviate from.

[36] It therefore follows that in flagrantly ignoring the provisions of regulation 17, the arbitrator failed to apply his mind to the material relevant to the consideration whether the appeal authority had the power to impose a harsher sanction than that imposed by the chairperson of the disciplinary hearing and therefore unduly narrowed the enquiry into the fairness of the dismissal. This, in my view, constitutes a gross irregularity in terms of section 145 of the LRA, the consequence of which is that the applicant was deprived of a fair hearing. It was as a result of the failure to apply his mind to material relevant to a fair determination of the dispute that the arbitrator arrived at a conclusion that is grossly irregular which accordingly warrants interference with the arbitration award.

[37] In my view, the reading of regulation 17 cited above makes it clear that the powers of the appeal authority are limited to upholding the appeal, or reducing the sanction or confirming the outcome of the disciplinary hearing. There is no provision in this regulation giving the appeals authority the power to give a harsher sanction than that imposed by the disciplinary hearing. The question of whether the appeal authority had the power to change the sanction imposed by the chairperson of the disciplinary hearing was an important aspect in the consideration of whether the dismissal was fair. The arbitrator misconceived his powers which resulted in him failing to apply his mind to the critical question of powers of the appeal authority.

[38] In light of the above, I am satisfied that the applicant has made a case for review which warrants interference with the arbitrator's arbitration award. In the circumstances of this case, I see no reason why costs should not in law and fairness follow the results.

[39] It seems to me that ordinarily, I should be remitting this matter back to the first respondent. However, in the interest of expediting the resolution of this

dispute, it seems fair and proper to deal with it on the basis of an assumption. The assumption has to be made on the basis that there was only two bases upon which the appeal authority could have dealt with the decision of the chairperson of the disciplinary hearing i.e confirmation or reduction of the sanction. That being the case it would mean that the suspended sanction would by now have lapsed. Except for the finding of guilt the matter has now become academic and it is for this reason that I believe sending the matter back to the first respondent for fresh determination would defeat the spirit of expeditious dispute resolution as envisaged in the Labour Relations Act of 1995.

Order

[40] In the premises, the following order is made:

1. The arbitration award made by first respondent under case number PSSS 210-08/09 dated 17 July 2009 is reviewed and set aside.
2. The arbitrator's arbitration award is substituted with an order to the effect that the dismissal of the applicant Mr Lisanyane was substantively unfair and the second respondent, the South African Police service is accordingly ordered to reinstate him retrospective to the date of the dismissal without loss of benefits and with back pay.
3. The second respondent is to pay the costs of the applicant.

Molahlehi J

Judge of the Labour Court

APPEARANCES:

FOR APPLICANT: Mr E Louw of Eric H Louw Attorneys

FOR FIRST RESPONDENT: Adv M Zulu instructed by the State Attorney

Labour Court