**REPUBLIC OF SOUTH AFRICA**

Reportable/Not Reportable

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Case no: JR2525/11

In the matter between:

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| **EMFULENI LOCAL MUNICIPALITY** | **APPLICANT** |
| and | |
| **SALGBC** | **FIRST RESPONDENT** |
| **MATLALA *NO*** | **SECOND RESPONDENT** |
| **SAMWU OBO NAOMI PAULINE TWALA** | **THIRD RESPONDENT** |

**Heard**: **11 June 2015**

**Delivered**: **14 October 2015**

**Summary: Review – dismissal for misconduct - evidentiary burdens**

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**JUDGMENT**

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**WHITCHER J**

[1] The Applicant seeks to review and set aside an arbitration award in which the second respondent ('the arbitrator') found that the dismissal of the employee, Naomi Pauline Twala, was substantively and procedurally unfair and ordered her reinstatement.

[2] Before I proceed to the merits of the application, I need to address the Applicant's failure to timeously file heads of argument. The review application and the record were timeously filed in November 2011 and 2012 respectively. However, the Applicant filed its heads of argument on 9 June 2015, one business day before this hearing, despite having being called upon by the Registrar and the employee's attorney to file heads of argument on 23 July 2013, the 17 March 2014 and 27 March 2015. I decided not to strike the matter from the roll because this would further delay the matter, and the conduct of the Applicant can be addressed with an appropriate cost order. Moreover, the grounds of review are set out in sufficient detail, with reference to the record, in the Applicant's founding and supplementary affidavits.

<u>Background facts</u>

[3] In 1986 the employee became employed by the Applicant. At the time of her dismissal she was working as a clerk in the municipal courts division of the Applicant. It is common cause that in the employee's line of work, only prosecutors and magistrates have the authority to cancel traffic fines. The employee's function was to process ("capture") authorized cancellations of traffic fines in the Applicant's "contravention system". It is also common cause that the clerks access the system via personal user names and passwords.

[4] In September 2010, the Applicant discovered that on the 2, 3 and 6 September 2010, a total of 29 traffic fines, totaling R26 000.00, were cancelled without the relevant authority, 18 of which had been issued to the same family. The cancellations were processed with the employee's username and password.

[5] The employee was charged with three counts of misconduct, namely (1) "gross misconduct in that on 2, 3 and 6 September you improperly and unlawfully

withdrew traffic cases on the contravention system", (2) "gross dishonesty and/or fraud in that on 2, 3 and 6 September you wilfully and with intention to defraud withdrew 29 cases of traffic cases…for personal gain", and (3) "gross dereliction of duty".

[6] For reasons not explained at the arbitration, the chairperson of the disciplinary hearing withdrew the charge of "gross dereliction of duty".

[7] The employee pleaded guilty to the first two charges at the disciplinary hearing. After considering submissions on mitigating and aggravating circumstances, the chairperson of the disciplinary hearing found dismissal to be the appropriate sanction.

The arbitration award

*The issue of guilt*

[8] At the arbitration, the employee pleaded not guilty to the charges. She claimed that the prosecutor in her case misled her into pleading guilty at the disciplinary hearing. The prosecutor told her and her trade union representative, Mr Mofokeng, that if she pleaded guilty he would ask the chairperson of the hearing to hand down a lenient sentence; which he did. After he addressed the chairperson on aggravating circumstances, he recommended a sanction short of dismissal. She was therefore shocked when the presiding officer recommended dismissal as the appropriate sanction.

[9] Mr Mofokeng's version differed from that of the employee in that, on his account, the prosecutor categorically promised that the employee would be issued with a final written warning if she pleaded guilty.

[10] During cross-examination the employee conceded that she was not forced to plead guilty. It was suggested to her that a prosecutor could only offer advice since final decision rested with the chairperson of the disciplinary hearing.

[11] The arbitrator refused to admit the evidence of the alleged undertakings provided by the prosecutor because the prosecutor was not called as a witness to confirm same. The propriety of this ruling is questionable but it is not under cross-review; so it stands. This means that the arbitrator had before him the following material fact: at her disciplinary hearing, the employee pleaded guilty to charges of dishonestly and unlawfully cancelling the traffic fines in question.

[12] I turn now to the other evidence that was before the arbitrator regarding the guilt of the employee.

[13] As stated earlier on, it was common cause that on 2, 3 and 6 September 2010, a total of 29 traffic fines, totaling R26 000.00, were unlawfully cancelled and the cancellations were processed with the employee's username and password.

[14] Mrs Bouwer, the employee's chief superintendent, testified that all the clerks have personal passwords which they personally create for security reasons. They are not permitted to disclose their passwords to anyone, including other clerks for obvious reasons. The rule is that if they inadvertently or for some other reason disclosed their password to anyone, they must immediately report this. Bouwer agreed that, if the employee had accessed the traffic fine system using her password and had then "left her computer open", some other clerk could have cancelled the fines.

[15] The employee denied cancelling the traffic fines in question. She claimed that "she must have left her computer open" during a busy period and as a result some other clerk had then cancelled the fines.

[16] When she was cross-examined, she was referred to the findings of the disciplinary chairperson which indicated that she had provided a different defence at the disciplinary hearing. In mitigation of sentence she had claimed that she may have inadvertently disclosed her password to other clerks.

[17] In the end, the arbitrator found the Applicant had failed to prove that the employee's conduct was dishonest or amounted to fraud. In essence, he found

that the Applicant had failed to prove the charges brought against the employee. In his view, the evidence, at most, disclosed that the employee was only guilty of contravening the rule against leaving her computer open and sharing her password with other clerks.

[18] The Applicant pointed out that the arbitrator merely set out a conclusion with no articulated reasons (substantiation) for his findings.

[19] This approach by the arbitrator to the evaluation of evidence constitutes an irregularity by the arbitrator. However, the court must still have regard to the issues and the evidence as a whole to determine whether or not the outcome is nevertheless capable of being sustained. The Labour Appeal Court said this in the following terms:

> "The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence"[1]

[20] The Applicant submitted that the arbitrator clearly did not appreciate the inferences which arise from the following facts viewed together, namely that not one, or a few, but 29 separate transactions were processed over different days (2, 3 and 6 September) on the same employee's computer and password.

[21] The Applicant submitted that these "coincidences" and the fact that the employee pleaded guilty to the charges at the disciplinary hearing would have led a reasonable decision-maker to a conclusion that on a balance of probabilities the employee was guilty of the charges.

[22] Before I make my findings it is useful in this case to set out certain trite rules of evidence. In misconduct disputes the employer need only show that, on *all* the evidence presented by both parties, its version is more probable than the employee's version.

[1] *Head of the Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC) at para 31.

[23] During an arbitration, while the overall onus never shifts from the employer, the need to present or counter evidence may rest on different parties. In a case involving misconduct, once the employer has fleshed out its allegations with evidence to a degree that its version requires an answer or rebuttal lest it be believed, the evidentiary burden shifts onto the accused employee to prove otherwise.

[24] For example, in *Woolworths (Pty) Ltd v CCMA and Others*,[2] the Labour Appeal Court held that video footage capturing an employee concealing merchandise on her person while working in a retail store constitutes a *prima facie* case of dishonesty against the employee. This then shifts the evidentiary burden to the employee. In the absence of a credible and probable explanation from the employee, the inference that the arbitrator can most reasonably draw is that the employee acted dishonestly and that the employer has discharged its onus.

[25] A further relevant rule of evidence is that an employee is not entitled to the benefit of the doubt as to the convincing nature of his or her explanation. On raising a particular defence, an evidentiary burden falls on the employee to establish that his or her version is likely. It is not necessary for the employer to adduce evidence to disprove positively a defence, especially if the defence is within the unique knowledge of the employee. An employer must prove its own case on a balance of probabilities. If it does so, it therefore flows that the employee’s case is false.

[26] It follows from the above mentioned judgment and rules of evidence that once the Applicant proved that 29 separate transactions were unlawfully processed over separate days (2, 3 and 6 September) on the same person’s computer and personal password, namely that of the employee, proved that the employee was

[2] (2011) 32 *ILJ* 2455 (LAC) at para 34.

at work on those days, proved the rule against disclosing passwords and proved that the employee voluntarily plead guilty to the charges, the Applicant had established a *prima facie* case of unlawful conduct and dishonesty on the part of the employee.

[27] In the absence of a credible and reasonable explanation from the employee, the inference that the arbitrator should most reasonably have drawn is that the employee is guilty and that the Applicant employer has discharged its onus.

[28] The question that thus arises is whether the employee provided a reasonable explanation in rebuttal? In my view, she did not. What she provided were vague, unsubstantiated and inconsistent explanations.

[29] At the disciplinary hearing her defence was that she may have disclosed her password to some unidentified clerks. Important details such as to who and when she disclosed her password are missing. Moreover, considering the strict rule against disclosing passwords and the purpose of having a confidential password, the issue of why she disclosed her password is critical. She never explained why she disclosed her password in contravention of the rule. Considering that she used this defence at the disciplinary hearing, which was not long after the events, it follows that she would have been in a position to consider and recall such details, but she was silent on these details at the disciplinary hearing and the arbitration. It is reasonable to conclude that she was silent on these matters because they did not exist.

[30] At the arbitration, the employee's defence then changed to the vague and unsubstantiated possibility that she may have left her computer "open".

[31] She claimed that it was common practice for clerks to leave their computers open during busy periods. Considering the sensitive nature of the work the employee did and the purpose of the passwords, this is a startling claim and, as such, needed some confirmation either from a fellow clerk or, more easily, Mrs Bouwer

who was in attendance at the arbitration and was cross-examined on the operating procedures of the clerks.

[32] In light of all the above, including the Applicant's submissions regarding the "coincidences" (as described earlier on), the arbitrator's bald finding that the Applicant failed to prove the misconduct charges is not a reasonable and rational conclusion.

[33] At most, the employee created a hint of doubt and the remote possibility that some other person committed the offence. But this was not sufficient in light of the standard of proof applicable in labour disputes. In *Potgietersrus Platinum Ltd v CCMA and Others*[3], the Court held that an arbitrator incorrectly applied the required standard of proof. The arbitrator accepted the remote possibility that persons other than the accused employee had committed the offence, thus superseding the greater probability that the employees had committed the offence.

*Inconsistency*

[34] Mr Mofokeng testified that at some time in the past he represented a Mr Ntuli who pleaded guilty to theft and bribery charges and on the basis of his plea he was demoted, and not dismissed. Mr Mofokeng also claimed that a Ms Fortuin pleaded guilty to charges of insubordination and the use of abusive language but was not dismissed.

[35] On the basis of this testimony, the arbitrator found that the Applicant was inconsistent in its application of disciplinary sanctions to employees who had committed the same or similar offences, and as a consequence the employee's dismissal was substantively unfair.

[3] (1999) 20 ILJ 2679 (LC).

[36] Firstly, Ms Fortuin's issue did not involve the commission of the same or similar offence. Secondly, the Applicant demonstrated with reference to the record that the defence of inconsistency was not disclosed in the employee's opening statement and was not put to the Applicant when it led its case first. The Applicant thus had no notice that this was a case to meet at the arbitration. The arbitrator furthermore did not alert the Applicant to their right to rebut same after the employee's case. The Applicant was thus denied their right to a fair hearing on this issue.

[37] The arbitrator moreover failed to appreciate and apply the correct legal principles applicable to historical inconsistency in the exercise of discipline. The arbitrator failed to appreciate that an employee cannot profit from such prior decisions of an employer, especially if the decision is questionable.[4] The arbitrator accordingly committed a material error of law.

*Bias chairperson*

[38] The arbitrator found that the chairperson of the disciplinary hearing was not "impartial" because, according to the testimony of Mr Mofokeng, the chairperson remained in the room while the parties discussed the plea bargain.

[39] Contrary to the arbitrator's findings, the Applicant demonstrated, with reference to the record, that there was no testimony to the effect that the parties discussed the merits of the case in the chairperson's presence and disclosure of a plea bargain to the chairperson does not disqualify a chairperson. It is also relevant that, despite the abovementioned finding, the arbitrator found that the chairperson gave the employee a fair hearing.

*Appeal hearing*

[40] The arbitrator found that the dismissal of the employee was procedurally unfair because the Applicant did not hold a formal appeal hearing but determined the

[4] See: *Southern Sun Hotels Interest (Pty) Ltd v CCMA and Others* (2010) 31 ILJ 452 (LC).

employee's appeal against her dismissal on the parties' written submissions. The Applicant did not pursue its challenge to this finding. The ruling of the arbitrator therefore stands.

[41] Considering the limited nature of the procedural unfairness and the facts before me, I do not consider it expedient to remit the matter to the First Respondent to determine the appropriate compensation. I consider one month's compensation to be fair.

Conclusion

[42] In light of my findings, I make the following order:

1. The arbitration award of the Second Respondent is reviewed and set aside and substituted with an award that:
   (a) The dismissal of the employee, Naomi Pauline Twala, was substantively fair but procedurally unfair.
   (b) The employer is ordered to pay the employee one month's compensation within twenty one (21) days of the date of this award.
2. There is no award of costs against the Third Respondent.

Whitcher J

Judge of the Labour Court

APPEARANCES

For the Applicant: Adv Moretlwe instructed by Kgokong Nameng Tumagole Inc

For the Third Respondent: R Daniels from Cheadle Thompson and Haysom