



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

CASE NO: D544/13

NOT REPORTABLE

In the matter between:

MSUNDUZI MUNICIPALITY

Applicant

and

PRISCILLA HARRIS

First Respondent

ADVOCATE P.E. VAN ZYL

Second Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL (SALGBC)**

Third Respondent

Heard: 09 July 2014

Delivered: 01 December 2015

JUDGMENT

PILLAY AJ:

[1] The Msunduzi Municipality as employer seeks an Order reviewing and setting aside the award of the Commissioner (the Second Respondent) in an arbitration held before the South African Local Government Bargaining Council. The employee as First Respondent opposes the application.

[2] The First Respondent was employed by the Applicant from February 1994. After certain forensic investigations into the affairs of the Applicant, disciplinary proceedings were brought against the First Respondent. The First Respondent is referred to in at least three (3) forensic reports being:

- a) a report by the FIRM (Forensic Investigation Risk and Recovery Management) dated April 2007;
- b) the MORAR report from January 2010;
- c) a report by the internal forensic investigator in the office of the Municipal Manager (Mr G. Maritz) dated August 2010.

[3] In line with the report by Maritz, a pre-suspension hearing was convened on the 14th of September 2010 whereafter the First Respondent was suspended from her employ.

[4] The complaint against the First Respondent was that she had submitted an application for an inter-departmental bursary during 1999, purportedly to study for a one (1) year diploma in Human Resources at the Varsity College when in fact she had already completed an eighteen (18) week course for the qualification (Human Resource Management and Training Diploma) in 1998.

[5] Despite the forensic investigations dating back to April 2007 and the suspension during 2010, formal charges were brought only in July 2012 when the First Respondent was given notice to attend a disciplinary enquiry set down for the 1st, 2nd and 3rd of August 2012.

[6] Four (4) charges were raised against the First Respondent. The First Respondent was found guilty on counts 1 and 3, namely:

"COUNT 1

That the employee is guilty of contravening sec 2(b) and 2(d) of the Code of Conduct for Municipal Staff Members (Schedule 2 of the Local Government: Municipal Systems Act 32 of 2000), copy of which is attached in that, in the knowledge that she had completed an 18 week course for the qualification

"Human Resources Management and Training Diploma; in 1998 at Varsity

College,

made application for and accepted financial assistance under Council's Bursary Scheme to undertake a course for a one year Diploma in Human Resources Management and Training at Varsity College on the basis it was for the 1999 academic year. Therefore failing to conduct herself with honesty and integrity.

COUNT 3

Putting the organization into disrepute, in that the reputation and integrity of the Msunduzi Municipality was compromised and dented to the members of public. (Varsity College Staff)."

[7] The Chairperson of the internal enquiry, Lelani Van Den Berg recommended the sanction of dismissal. The First Respondent then referred an unfair dismissal dispute to the Third Respondent and the arbitration was then chaired by the Commissioner between the 17th of January 2013 and the 13th of May 2013.

[8] In his award of 10 June 2013, the Commissioner found the dismissal to be substantively unfair and ordered the Applicant to reinstate the First Respondent in its employ on terms and conditions no less favourable to her than which had governed her employment prior to her dismissal. The Commissioner directed the payment of

Four Hundred and Thirty Two Thousand Ninety Rand and Two Cents (R 432 090.02) less deductions together with orders for costs.

[9] The Applicant is challenging the findings of substantive unfairness.

[10] The charges brought against the First Respondent stem from a scheme conducted by the municipality whereby it funds the further education of its employees through a bursary system. Dr. Julie Dyer, the Medical Officer of Health for the municipality, gave evidence about the scheme. She confirmed that employees would ordinarily apply for funding if the employee intended to follow a particular course. Dyer would investigate whether the course was relevant to the employee's position and if money was available, the municipality would then provide funding. She confirmed that on her investigations, the First Respondent had applied to study a diploma with the Varsity College in Human Resources. This was a one (1) year course and on Dyer's understanding was to have commenced during 1999.

[11] The case for the employer was that the First Respondent, when applying for funding, did so when she had already completed an eighteen (18) week course at the Varsity College during 1998. The municipality avers that she misrepresented the true facts and applied on the pretence of wanting to commence the course during 1999. The municipality also contends that the First Respondent misrepresented the true facts in that she represented that she had submitted the form during 1998. This, it is alleged, is borne out by the fact that the form represents the Applicant's age as 39 when in fact during 1998 she was 38. The Applicant turned 39 during 1999.

[12] Based on these facts, the Chairperson of the internal enquiry found that the First Respondent had “patently misled her employer into agreeing into awarding a bursary in her favour”.

[13] The Commissioner in considering Count 3 concluded that there was absolutely no evidence tendered as to how the First Respondent’s alleged conduct had compromised the reputation and integrity of the municipality. By contrast, the Chairperson of the internal enquiry determined the First Respondent’s guilt on what she termed an “objective test”. Part of her assessment was to hold against the First Respondent the fact that external third parties were called to take part in an internal disciplinary hearing. There is no merit in that finding. It holds the employee accountable for witnesses called to testify on the employer’s behalf. The Applicant’s challenge to the Commissioner’s findings on Count 3 concedes that there was no direct evidence that the reputation and integrity of the Applicant had been compromised by the conduct of the First Respondent. The Applicant, however, asks that an inference be drawn as the most probable version given the circumstantial evidence as a whole.

[14] Having regard to the testimony before the Commissioner, I agree with his assessment of Count 3. Insofar as the Applicant contends for an inference, I cannot fault the Commissioner for failing to draw that inference on the scant evidence before him.

[15] Pertaining to Count 1, the Commissioner had little regard for the First Respondent’s argument that the employer had failed to demonstrate that a general

rule existed which precluded employees from applying for a bursary after having completed the intended course. The Commissioner rejected the argument and found that the crisp issue for determination was whether or not the First Respondent was dishonest in having supplied false information in her application and for being granted the bursary based on a falsified application.

[16] The Commissioner, in a detailed award, considers the factual aspects relevant to the employer's case. He accepts the First Respondent's explanation that she had incorrectly stated her age because of a genuine mistake. She confirmed that she was under stress at the time that she completed the form. The Commissioner finds on the probabilities that the application form must have been submitted and certified during 1998. He refers to the evidence of the witness for the college who conceded that there was little chance the college would have colluded with a student to certify something that was not accurate. He concludes therefore that the form must have been presented in 1998.

[17] In the circumstances, the Commissioner found that the employer had failed to prove dishonesty on a balance of probabilities.

[18] Initially, the Applicant attacked these findings as unreasonable on a substantive but moreso a dialectical level. The Applicant had formulated its case to argue the possibility that the court may accept that the award is wrong but not necessarily unreasonable.

[19] At the hearing of the matter, however, Counsel disavowed, and quite rightly

so, reliance on the dialectical approach.

[20] Following a number of different interpretations and applications, the Supreme Court of Appeal in *Herholdt v Nedbank Limited & Another*¹ concluded as follows:

“In summary the position regarding the CCMA awards is thus – A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in Section 145(2)(a) of the LRA. For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated in Section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to particular facts are not in and of themselves sufficient for an award to be set aside but are only of consequence if their effect is to render the outcome unreasonable.”² [My underlining]

[21] The judgment of the SCA clearly postulates an outcome based test in review applications. Put otherwise, the court must consider whether the arbitrator has determined the principle issue before him based on the material presented at the arbitration. The question then becomes whether the conclusion of the arbitrator falls within a band of reasonableness such as to justify his award.

[22] Despite the argument for the Applicant, I am unable to conclude that the

¹ (2013) 34 ILJ 2195 (SCA). See also: *Sidumo & Another v Rustenburg Platinum Mines Limited & Others* 2008 (2) SA 24 (CC)

² *Herholdt v Nedbank Limited & Another* (2013) 34 ILJ 2795 (SCA) at paragraph 25.

Commissioner's award is a material departure from the acceptable norm nor a material deviation from the actual evidence before him or a failure to consider and determine the evidence or case such as would constitute an irregularity sufficient enough to call for the award to be set aside on review.

[23] If anything, I am satisfied that the Commissioner's findings fall within a band of reasonableness as referred to hereinabove.

[24] Even if I am wrong, there are further matters referred to by the Commissioner that show the dismissal of the First Respondent was substantively unfair. Two (2) of these are significant.

[25] The alleged misconduct occurred either during 1998 or 1999.

[26] An initial forensic investigation was conducted by **Forensic Investigation Risk and Recovery Management (the FIRM)**. A report dated 2007 was submitted. The Chief Executive Officer of the FIRM, Mr Naidoo testified and confirmed his recommendation in 2007 that disciplinary action be taken against the First Respondent.

[27] A further report referred to as "**The MORAR**" report seems to have been commissioned during 2010. That report likewise recommended disciplinary action against the First Respondent.

[28] Sometime during August 2010 an employee of the municipality, Mr Maritz,

who also testified at the arbitration, conducted a further investigation and compiled a report based on the two (2) reports referred to. He likewise recommended the disciplinary sanction.

[29] The Commissioner concluded that the delay, from the FIRM report in 2007 or the subsequent MORAR report or Mr Maritz report to the date of institution of the disciplinary proceedings rendered the dismissal unfair.

[30] At the hearing the Applicant argued that an earlier condonation application granted before Commissioner Grobler for condonation under clause 6.3 of the Municipal Disciplinary Code rendered the dismissal fair. I cannot agree. The fact that Commissioner Grobler may have afforded condonation for the institution of disciplinary proceedings does not detract from the analysis into the substantive fairness of that dismissal. Where the employer has delayed, without proper explanation, for in excess of five (5) years from the date of the first report, that itself will render any subsequent dismissal unfair.

[31] If employers are tardy about instituting disciplinary action, the courts may find that the employer has simply waived its right to do so or that the employer has reconciled itself to the continuation of the employment relationship and has waived the right to dismiss the employee. In all cases, the period of delay must be measured from the time on which the employer becomes aware of the alleged misconduct. In this instance, the FIRM report was commissioned during 2006 and disciplinary proceedings was recommended in its findings published during 2007. There is no explanation for that delay. I am unable to fault the Commissioner's finding that in the

absence of a reasonable explanation for the delays that the First Respondent's dismissal was unfair.

[32] There is another matter which warrants mention. At the time of her dismissal, the First Respondent had been engaged with the municipality for eighteen (18) years. There was no evidence of any pending warning for misconduct of this nature.

[33] The record of proceedings shows that no evidence was led to demonstrate the irretrievable breakdown of the employment relationship. It is trite that in matters of this nature there rests an onus upon the employer to show that the conduct of the employee has damaged the trust relationship and that such damage in the circumstances warrants the sanction of dismissal.³

[34] Mr Pammenter SC for the Applicant argued that the facts of the charge, as demonstrated at the arbitration, lend themselves to the sanction of dismissal. He referred me in particular to *De Beers Consolidated Mines Limited v CCMA & Others*⁴

[35] Therein it was reasoned, *inter alia*, that if

*"despite the prima facie impression of reliability arising from long service, it appears that in all the circumstances, particularly the required degree of trust and the employee's lack of commitment to reform, continued employment of the offender will be operationally too risky, he will be dismissed."*⁵

³ *Edcon Limited v Pillemer N.O. & Others* (2009) 30 ILJ 2642 (LAC) at paragraph 23

⁴ 2000 21 ILJ 1050 (LAC) at paragraph 24.

⁵ At paragraph 24.

[36] That argument is sound. I am, however, mindful of the facts peculiar to the **De Beer's** matter. Therein, two (2) employees were dismissed for claiming and receiving pay for nine (9) hours of overtime when they did not work overtime at all. The allegations against these employees and the charges measured against them were an out-and-out fraud. I am uncomfortable applying that principle to the facts of this matter. Particularly where, as the Commissioner has ascertained the employer has failed to prove on the probabilities an act of dishonesty.

[37] I agree with the Commissioner's view that where the employer, in this instance, wanted to justify the sanction of dismissal on the charges brought against the First Respondent, that the employer must have led some evidence to demonstrate a disintegration of the trust relationship. That was not done.

[38] I therefore can find no reason to interfere with the Commissioner's award.

[39] I am mindful that there are certain aspects of the First Respondent's case which are difficult to reconcile. Her evidence with regard to the insertion of the incorrect age on the application form was, to say the least, troubling. With that said, our courts have consistently warned against crossing the divide between appeals and reviews. Whatever my views may be as to First Respondent's conduct, I am unable to criticise the Commissioner's award for lack of reasonableness.

[40] The First Respondent has asked that I dismiss the review with costs. As I

understand, I have a fairly wide discretion where it comes to the issue of costs.⁶ The First Respondent has been reinstated to her employ by the award of the Commissioner. No doubt, the parties will now attempt to rebuild their relationship. I cannot see how an order for costs could aid in that.

In the premises I make the following order:

- 1) The application for the review of the Second Respondent's award is dismissed.
- 2) There shall be no Order as to costs.

I. PILLAY

**ACTING JUDGE OF THE LABOUR
COURT SOUTH AFRICA**

Appearances:

For the Applicant:

CJ Pammenter SC

Instructed by Mdletshe Incorporated

For the First Respondent:

S. Moodley

Instructed by Premraj & Associates

⁶ See: Section 162 of the Labour Relations Act, 1995