



**THE LABOUR COURT OF SOUTH AFRICA
PORT ELIZABETH**

Not reportable

Case no: PR 71/13

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL:

DEPARTMENT OF EDUCATION: EASTERN CAPE

Applicant

And

THOBELA NCETezo N.O

First Respondent

THE EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

SOUTH AFRICAN DEMOCRATIC TEACHERS UNION

obo NDABAMBI

Third Respondent

Heard: 8 June 2016

Delivered: 7 July 2016

Summary: Review application. Arbitrator decided appropriateness of the sanction by considering a procedural delay in the internal appeal. No proper consideration of the appropriateness of the sanction in view of all the relevant circumstances. Award is reviewed and set aside. Dismissal was fair.

JUDGMENT

PRINSLOO J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 6 May 2013 wherein the First Respondent (the arbitrator) found Ms Ndabambi's (Ndabambi) dismissal procedurally fair and substantively unfair and ordered her retrospective reinstatement.
- [2] The Third Respondent opposed the application.

Background facts

- [3] Ndabambi was employed as a school principal at the Sinempumelelo Primary School, East London.
- [4] In October 2010 Ndabambi was charged with misconduct when a notice to attend a disciplinary hearing was issued to her.
- [5] A disciplinary hearing was scheduled for 26 October 2010 but postponed and subsequently held on 19 January 2011 and Ndabambi was found guilty on two charges of misconduct relating to a contravention of section 18(1) of the Employment of Educators Act 1998 in respect of her refusal to cooperate with the school governing body (SGB). On 1 February 2011 Ndabambi was dismissed.
- [6] On 12 April 2011 Ndabambi filed an internal appeal against her dismissal, which appeal was dismissed on 14 September 2012 when the sanction of dismissal was implemented.
- [7] The Third Respondent referred an unfair dismissal dispute to the Second Respondent (ELRC). The issue to be decided was whether Ndabambi's dismissal was substantively and procedurally unfair.

The arbitration proceedings:

- [8] It is evident from the transcribed record that the Third Respondent raised two challenges in respect of procedural fairness namely the fact that time frames were not adhered to with specific reference to the delay in time between the date when the sanction was issued, when the internal appeal was filed and

when the dismissal eventually took effect. Secondly that Ndabambi was not represented during her disciplinary enquiry and that she was deprived of a fair hearing for that reason. Substantive fairness was challenged in respect of the charges that were levelled against Ndabambi.

Analysis of the arbitrator's findings and grounds for review

- [9] The arbitrator found Ndabambi's dismissal procedurally fair and substantively unfair.
- [10] In the analysis of the evidence the arbitrator made the following pertinent findings in respect of procedural fairness: The request for legal representation was considered, Ndabambi released her own witness from testifying after she indicated an unwillingness to testify and the fact that the outcome of her appeal was delayed, did not prejudice Ndabambi as she received her full salary. The arbitrator found that Ndabambi's dismissal was procedurally fair.
- [11] In respect of substantive fairness the arbitrator summarised the reason for dismissal as Ndabambi's failure to follow a reasonable instruction and non-cooperation with the SGB. Ndabambi admitted that she did not cooperate with the SGB because to her it was not a duly elected structure because she was not present when it was elected. This was rejected by the arbitrator, who found that Ndabambi indeed failed to follow a lawful instruction and that her defence did not have any substance.
- [12] The arbitrator went further to find that as an employee Ndabambi had a common law duty to obey and follow lawful instructions and that the instructions that were given to her, were indeed reasonable and lawful. The arbitrator concluded that Ndabambi indeed committed the offences she was dismissed for and that her conduct amounted to misconduct.
- [13] Effectively the arbitrator found Ndabambi's dismissal procedurally fair and that she indeed committed the misconduct she was dismissed for. The remaining issue for consideration was the appropriateness of the sanction of dismissal.
- [14] In consideration of the appropriateness of the sanction of dismissal, the arbitrator referred to the Code of Good Practice: Dismissal and the principles as laid down by the Constitutional Court in *Sidumo and Another v Rustenburg*

*Platinum Mines Ltd and Others*¹ with specific reference to the totality of the circumstances, the reason the employer imposed the sanction of dismissal and the employee's basis to challenge the dismissal.

- [15] The arbitrator found that dismissal was not an appropriate sanction, but was too harsh and ordered that Ndabambi be reinstated retrospectively.
- [16] This is so because the Applicant did not advance any reasons for the delay in dealing with Ndabambi's internal appeal. The arbitrator found that if the employment relationship had indeed broken down irretrievably, the Applicant would have ensured that the employment relationship was terminated as soon as possible. The arbitrator accepted that the delay was indicative of the fact that the trust relationship was still intact. The arbitrator further found that the Applicant could have opted for a sanction short of dismissal in view of the fact that Ndabambi had a long service, the offences she was dismissed for are viewed as less serious and warrant progressive or corrective discipline, even though Ndabambi was disciplined for a similar offence in 2009.
- [17] As already alluded to it is evident from the transcribed record that Ndabambi regarded the delay in the finalisation of her appeal as a procedural challenge. The arbitrator found that the delay caused Ndabambi no prejudice and that her dismissal was procedurally fair.
- [18] The Applicant raised a number of grounds for review in respect of these findings on the substantive unfairness of Ndabambi's dismissal. In the heads of argument Mr Kroon on behalf of the Applicant submitted that the Applicant's case, distilled to its essence, is that the arbitrator came to a decision which no reasonable decision maker could have come to because the arbitrator failed to give any or proper consideration to the factors required to be taken into account when the question of a fair sanction is considered. Instead, she focussed almost entirely on the procedural delay in the finalisation of the appeal proceedings and concluded that the delay was the deciding factor to show that the employment relationship had not broken down.
- [19] The alternative ground for review is that the arbitrator misconceived the nature of the enquiry into sanction as she made a finding on a basis not envisaged or

¹ (2007) 28 ILJ 2405 (CC) at paragraph 78 and 79.

canvassed by the parties in the sense that the issue of the delay was raised as a procedural issue and not as a substantive factor. It was never raised during the arbitration proceedings that the procedural delay had an impact on the employment relationship. This ground for review only needs consideration if the Court is of the view that the arbitrator was entitled to have regard to the delay in finalising the appeal as part of deciding procedural as well as substantive fairness.

- [20] Mr Kroon submitted that the arbitrator misdirected herself by finding that the misconduct Ndabambi was dismissed for, was not serious. He submitted that the failure to cooperate with the SGB is very serious as it is a core function of a school principal and in this instance it was not only gross, but also deliberate. Ndabambi persisted with her view that she was entitled to ignore the instruction and to refuse to cooperate with the SGB. In my view there is merit in this argument.
- [21] Mr Kroon also submitted that the finding that the delay in the finalisation of the internal appeal rendered the dismissal substantively unfair, is illogical. The delay in the finalisation of the appeal was throughout raised as a procedural point and the arbitrator dealt with that as part of the procedural fairness of the dismissal. The arbitrator found the delay did not render the dismissal procedurally unfair. The Applicant's complaint is that the arbitrator was not permitted to revisit the issue of the delay as part of the determination of the substantive fairness of Ndabambi's dismissal and by doing so, the arbitrator confused and conflated the enquiries into procedural and substantive fairness.
- [22] Furthermore, the Applicant's argument is that there was no reasonable or objective basis for concluding that the delay in the finalisation of the internal appeal *per se* meant that the employment relationship had not broken down.
- [23] The Third Respondent opposed the application and submitted that there is no merit in the grounds for review mainly because the delay in finalising the appeal was not the only ground on which the arbitrator found that the employment relationship had not irretrievably broken down. The arbitrator also took into account the factors stated in the Code of Good Practice. Mr Pango on behalf of Ndabambi submitted that the arbitrator considered that Ndabambi assisted the school in the past, indicating that she acted in the best interest of

the school, which indicated that a sanction short of dismissal should have been considered.

- [24] The parties indicated that considerable difficulties were experienced to obtain and reconstruct the record and that the parties have exhausted all possible avenues to reconstruct the record. This contributed to the delay in finalising this matter and the parties are of the view that the review application should be decided without remitting the matter to the ELRC. Certain portions of the evidence were not transcribed and the parties agreed to proceed on the arbitrator's notes.
- [25] In my view the Applicant's review is limited to the findings on substantive fairness and more specifically the findings in respect of the appropriateness of the sanction of dismissal. Due to the limited scope of the review application and the specific nature of the grounds for review, I am of the view that the entire transcribed record of all the evidence is not necessary to decide the application before me and I will decide the matter on the record as it is.

The misconduct and the appropriateness of the sanction

- [26] The arbitrator's first enquiry and point of departure in determining the substantive fairness of the Ndabambi's dismissal should have been whether she was indeed guilty of the misconduct she was dismissed for. Once it is found that an employee is guilty of the misconduct she was dismissed for, an enquiry into the appropriateness of the sanction should follow.
- [27] For purposes of the review application the Applicant submitted that the relevant charge is that Ndabambi contravened section 18(1)(i) of the Employment Educators Act in that she failed to carry out a lawful order or routine instruction without reasonable cause in that she refused to cooperate with the SGB on matters of governance, despite being advised to do so and that she failed to carry out an instruction regarding a response to the allegations levelled against her.
- [28] The arbitrator concluded that Ndabambi indeed committed the offences she was dismissed for and that her conduct amounted to misconduct.
- [29] What remained was to decide whether dismissal was an appropriate sanction.

- [30] An enquiry into the appropriateness of the sanction calls for a consideration of the factors set out in Schedule 8 of the Labour Relations Act² (the Act) and a determination whether the sanction was appropriate for the contravention of the rule. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ the Constitutional Court set out the factors to be considered in determining the fairness of the sanction. Those are as follows:

In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances

- [31] In *Fidelity Cash Management Services v CCMA*⁴ the Labour Appeal Court referred to the *Sidumo* factors to be considered in deciding the appropriateness of a sanction and held as follows:

The Constitutional Court emphasized that this is not an exhaustive list. The commissioner would also have to consider the Code of Good Practice: Dismissal and the relevant provisions of any applicable statute including the Act. In this regard ss 188 and 192(2) of the Act will usually be of relevance. Section 188(1) provides in effect that a dismissal that is not automatically unfair is unfair if the employer fails to prove the matters stated therein. Section 182 enjoins a person considering whether a dismissal is unfair to take into account provisions of the relevant Code of Good Practice. Section 192(2) is the provision that places the onus on the employer to prove that the dismissal is fair.

Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was in all of the circumstances a fair sanction in such a case. In answering that question he or she would have to use his or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide. He or she is required to make a decision or finding that is reasonable.

² Act 66 of 1995

³ (2007) 28 ILJ 2405 (CC) at paragraph 78 and 79.

⁴ (2008) 29 ILJ 964 (LAC).

- [32] *In casu* the arbitrator considered the delay in finalising the appeal to find that the employment relationship did not break down. From there she took the view that the Applicant should have opted for a sanction short of dismissal, as Ndabambi had a long service record. She interpreted the Employment of Educators Act to find that the offences she found Ndabambi indeed committed, were viewed as less serious and warranted progressive or collective discipline in terms of the Employment of Educators Act. The arbitrator considered the fact that Ndabambi was disciplined for a similar offence in the year before she was charged with the misconduct she was eventually dismissed for, but held that it did not show a pattern of committing the same or similar offence.
- [33] A consideration of the factors set out in *Sidumo* and *Fidelity Cash Management* is glaringly absent from the arbitration award. Although the arbitrator listed the factors to be taken into account when determining the question of the appropriateness of the sanction, she never really dealt with those factors.
- [34] The arbitrator not only dismally failed to consider any of the aforesaid factors, for instance she did not consider harm caused by Ndabambi's conduct, but she also failed to consider all the relevant circumstances to decide whether Ndabambi's dismissal was an appropriate and fair sanction. In my view the arbitrator knew what to consider, as she listed the factors to be considered as the totality of the circumstances, the reason the employer imposed the sanction of dismissal and the employee's basis to challenge the dismissal. The arbitrator just never bothered to consider the factors she knew she should consider.
- [35] The arbitrator was required to determine the fairness and the appropriateness of the sanction of dismissal *de novo*, based on the evidence placed before her and with due consideration of all the relevant factors. She had to consider whether the Applicant's decision to dismiss was fair, not to decide what she would have done and to impose a sanction accordingly.
- [36] The Applicant adduced evidence about the role of the SGB and the functions it performs at the school and it was emphasized that the SGB was responsible for governance issues at the school. In terms of the provisions of the South

African Schools Act⁵ the functions and responsibilities of the principal of a school include *inter alia* attendance and participation in all meetings of the SGB, providing the SGB with reports and assistance to the SGB.

- [37] The evidence was that a meeting was held with Ndabambi on 23 March 2010 where she was advised to cooperate with the SGB and despite this instruction, she still refused to attend SGB meetings and to cooperate with the SGB. Ndabambi's refusal to cooperate resulted in a letter to the district director in July 2010, where after the disciplinary proceedings were initiated.
- [38] Based on the evidence, the arbitrator found that Ndabambi indeed failed to follow a lawful instruction and to cooperate with the SGB and that her defence did not have any substance, that Ndabambi had a common law duty to obey and follow lawful instructions and that the instructions that were given to her, were indeed reasonable and lawful. The arbitrator concluded that Ndabambi indeed committed the offences she was dismissed for and that her conduct amounted to misconduct.
- [39] Section 18(1)(i) of the Employment of Educators Act provides for misconduct where the educator fails to carry out a lawful order or routine instruction without just or reasonable cause. Section 18(3) provides for different sanctions, ranging from counselling to dismissal, if the nature or extent of the misconduct warrants dismissal.
- [40] It is evident that the arbitrator failed to give any or proper consideration to material facts when she determined the issue of substantive fairness. The importance of the SGB and the functions it performs, and duty of the principal to cooperate with the SGB and the seriousness of Ndabambi's failure to cooperate with the SGB were some of the material and pertinent facts not considered and assessed by the arbitrator.
- [41] In my view the arbitrator misconceived the nature of the enquiry and the powers that she has in determining the fairness of the sanction. The Constitutional Court made it clear that an arbitrator is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. What is required is that he or she must consider all

⁵ Act 84 Of 1996 section 16A.

relevant circumstances. The arbitrator approached the issue of sanction as if she was given the power to impose a sanction afresh.

- [42] Furthermore, the arbitrator's point of departure in considering the appropriateness of the sanction was that the trust relationship did not break down as the Applicant delayed in dealing with the appeal. The delay in dealing with the appeal could at best influenced and informed the findings on procedural fairness. The arbitrator however found that the delay was not prejudicial as Ndabambi was paid through out and her dismissal was procedurally fair.
- [43] In my view the arbitrator's point of departure in considering the appropriateness of the sanction is a point where she could not have departed from in the first place. The delay was a procedural defect and could not have impacted on the question of substantive fairness.
- [44] The wrong point of departure had a material impact on the arbitrator's decision on the appropriateness of the sanction. In fact, it determined the entire outcome of the arbitration.

The test on review

- [45] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo*⁶ as whether the decision reached by the arbitrator is one that a reasonable decision maker could not reached. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.
- [46] In *Goldfields Mining South Africa v Moreki*⁷ the Labour Appeal Court held that:
- “In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.”
- [47] Following the Supreme Court of Appeal judgment in *Herholdt*⁸ and the Labour Appeal Court's judgment in *Gold Fields*,⁹ the Labour Appeal Court handed

⁶ (2007) 28 ILJ 2405 (CC) at para 110.

⁷ (2014) 35 ILJ 943 (LAC).

down another important judgment in *Head of the Department of Education v Mofokeng*.¹⁰ In this judgment the Court provided the following exposition of the review test:

Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result.

The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

- [48] In summary: I must ascertain whether the arbitrator considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable.
- [49] Viewed cumulatively, and in line with the analysis as set out in *Mofokeng*, the arbitrator *in casu* diverted from the correct path when she found that the trust relationship did not break down on the strength of a pure procedural delay. Once she diverted, the arbitrator did not find her way back, but proceeded on the path that led her to misconceive the enquiry to an extent that calls for interference on review.
- [50] It cannot be said that the arbitrator's findings on substantive fairness and that dismissal was an inappropriate sanction were findings that a reasonable arbitrator could have reached on the full conspectus of all the facts before her.

⁸ [2013] 11 BLLR 1074 (SCA).

⁹ [2014] 1 BLLR 20 (LAC).

¹⁰ [2015] 1 BLLR 50 (LAC), paragraph 33.

[51] Based on the above, I am persuaded that the arbitration award cannot stand and should be interfered with on review.

Relief

[52] This leaves the issue of relief.

[53] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that Ndabambi's dismissal was fair.

[54] In the event the award is set aside on review, this Court has a discretion whether or not to finally determine the matter.

[55] The parties are of the view that the matter should be finally determined, more so as it is undesirable to remit the matter to the ELRC since the dismissal took place as far back as 2011. The Applicant also submitted that it is not necessary to remit the matter as the arbitrator found Ndabambi guilty of misconduct and the only issue is the question of the sanction. Ndabambi's heads of argument made it clear that the application should be dealt with on the papers as they stand as the grounds for review and the facts are fully dealt with in the award and the finalization of this matter should not be delayed.

[56] I already alluded to the fact that the scope of the review application is limited and due to the nature of the grounds for review, I am in a position to decide and finally determine the matter on the record as it is.

[57] In argument before Court both parties submitted that the costs should follow the result and both parties sought costs to be awarded in their favour. However, both representatives indicated that they would finally leave the issue of costs in the hands of the Court.

[58] This Court has a discretion in making a cost order, considering the requirements of law and fairness. In my view this is a case where interests of justice and fairness would be best served by no cost order.

[59] In the premises I make the following order:

Order

1. The arbitration award issued on 6 May 2013 under case number PSES401-12/13EC is reviewed and set aside;
2. The arbitration award is substituted with an order that Ms Ndabambi's dismissal was fair;
3. There is no order as to costs.

C Prinsloo

Judge of the Labour Court

Appearances:

Applicant: Adv Kroon SC

Instructed by: State Attorney

Third Respondent: Adv Pango

Instructed by: Pumeza Bono Attorneys

Labour Court