Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JR 3015/06

In the matter between:

DEPARTMENT OF AGRICULTURE, LIMPOPO PROVINCE — **Applicant**

and

T R MANAGA — **First Respondent**

RAMABULANA L, *N.O* — **Second Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL — **Third Respondent**

Heard: 26 April 2017

Delivered: 05 May 2017

Summary: (Review – record incomplete – findings on procedural fairness caused by a misdirection – finding of substantive fairness upheld because of limited ground of review relied on - failure to consider if reinstatement appropriate in light of perverse reasoning on relevance of prior misappropriation of funds – substitution of remedy)

JUDGMENT

LAGRANGE J

Introduction

[1] This is a review application of an award handed down on 26 September 2006. The arbitrator found that the first respondent's dismissal was unfair and set it aside, substituting the sanction of dismissal with a final written warning valid for six months and reinstating her to her former position with effect from 15 October 2016.

[2] The applicant had been charged with not banking money timeously in terms of s 45(c) of the Public Finance Management Act, 1 of 1999. In particular, for only banking R 1816-40 when she ought to have banked R 3046-38. Following an investigation into a discrepancy between monies received and money spent the shortage was discovered and the applicant refunded the missing money.

[3] The applicant timeously launched the review application in November 2016. After that, matters did not proceed smoothly and culminated the first respondent bringing an application under Rule 11 to dismiss the review application. That application was dismissed by this court on 23 December 2016. The learned judge in that matter, Boyce AJ, dismissed the Rule 11 application which was only launched on 20 January 2015, primarily on the basis that the first respondent had failed to put the applicant on terms before springing the dismissal application upon it. The court also found that both parties had been responsible for the considerable delays in finalising the matter, and noted that the applicant had never taken any steps to compel the second and third respondents to provide the missing portions of the record.

[4] As far back as August 2009, an affidavit was filed on behalf of the bargaining council in which it was claimed that the arbitrator alleged that he had sent the record of the arbitration proceedings to it, but the bargaining Council was not in possession of the record and surmised that because the matter was "a very old" one "such records may have been lost in the re-archiving of documents". Regrettably, it is not infrequent that certain bargaining councils have simply failed to administer the dispute

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resolution functions efficiently, and this appears to be yet another instance of that syndrome. It is a wholly insufficient explanation for a missing record to simply deem a three-year-old matter very old and speculate about its loss. The consequences for parties to arbitration hearings of such indifferent record-keeping are enormous.

[5] In the circumstances, the applicant proposed an attempted reconstruction of the record but the first respondent rejected such a proposal out of hand and indicated her intention to proceed to enforce the award. Consequently, the first respondent cannot complain that the record is incomplete. As things stand therefore the only account of the evidence is what is contained in the arbitrator's award, save for some issues canvassed in the review affidavits.

[6] An *in limine* point was raised by the applicant concerning the late filing of a condonation application by the first respondent in respect of her answering affidavit which had been filed inordinately late. I agree with the applicant that there was really no good excuse for the late filing of the affidavit and no reason for the further delay in filing a condonation application which was only filed shortly before the matter was heard. However, no jurisdictional question rests on the late filing of the answering affidavit been condoned. Further, there is a lack of any obvious prejudice caused to the applicant by the late filing of the answering affidavit to which it had replied in any event. In the context of the general dilatoriness of both parties in conducting the review and dismissal application proceedings to date, which were largely dealt with in the judgement in the dismissal application, I am not inclined to disallow the answering affidavit.

<u>The arbitration award</u>

[7] The arbitrator characterised the first respondent's claim of unfair dismissal in the following terms:

> "[The] applicant challenges the fairness of the dismissal on the basis that the same was harsh and the fact that the dismissal constituted double punishment in that applicant had earlier been reprimanded and given a warning coupled with the instructions to refund the short banking that was made earlier on.

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The procedure used by the respondent was also challenged in that the applicant was made to confess and to admit to the offence without being informed of her rights to remain silent and the fact that whatever the evidence or information she gives whilst being interviewed might be used against her at a later time or in the disciplinary hearing.

Applicant further argued that she was unduly influence in making the confession with a promise that a refund of the money would put the matter to rest.

Further that applicant was treated differently compared to employee Nedzama who misappropriated state money but was not dismissed, he was given a lesser punishment and was retained as an employee of the state, a notch was taken from his rank status and this is equivalent to a demotion."

(*sic*)

[8] In his summary of the first respondent's evidence, the arbitrator highlighted her evidence of inconsistency and her expectation that she would not be dismissed given her length of service (21 years), the more lenient sanction meted out to Nedzamba, her situation as a single parent, that she did not deal with money issues in her normal daily work and the fact that she repaid the money. He also noted that she claimed she pleaded guilty because she had been made to admit her guilt and repay the money and that she did not give an explanation about why she pleaded guilty as she had not been asked about her reasons for doing so. She was under the impression that she had already been punished and her misconduct had been pardoned.

[9] The significance of the first respondent's confession which was reduced in writing in a letter addressed to the deputy manager on 13 May 2005 featured prominently in the arbitrator's award. It read:

"Payment with regard to the money that did not add up for the time I was receiving money for the Government.

I, Thinavhuyo Rosina Magana ... I was responsible for the short in the amount of R 1230-00 which I have repaid back. My main intention was not to take the money illegally, I was going to repay it back unfortunately I was late and banking occurred before I could pay, this resulted in the short

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> banking. As a result I agree that I must be responsible for the money that has fallen short."

The arbitrator further recorded the following summary and assessment of the first respondent's evidence during the arbitration:

> "During arbitration applicant conceded that she took part of the money and to use it for the purpose of her father's medical bills. Her intentions was to repay this money back at a later stage to not take it for herself. In my view it is immaterial whether or not applicant was trained in the financial issues as cashier or otherwise, the important fact here is that she took the money without authorisation or put purposes that were unauthorised. It is clear from the evidence she committed misconduct by taking the money and used it without the proper authorisation."

He also recorded that:

> "With regard to the money not banked that she banked the money that was not enough because returns where needed. She wanted to wait for Maimela [her manager] to come back so that she could refund the money; she conceded she used the money for her father's medical bill."

[10] Later, in the arbitrator's analysis of the evidence he mentions how it was only after an investigation that the short payment of the money was discovered and the first respondent admitted that she had taken the money.

[11] It appears from the arbitrator's account of the evidence that in a previous disciplinary matter fifteen years earlier that the applicant had also been made to make good an amount of R 4887-93 which had been lost. In that matter too, the first respondent had admitted in a letter that she used the money and agreed to refund it, though she claimed at the arbitration that the loss was not her fault but that she had been made to cover up the matter because she was the person responsible for collecting the money. She also admitted that she was warned not to repeat the mistake.

[12] In arriving at his findings, the arbitrator placed much emphasis on the following points in his evaluation:

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12.1 The first respondent was improperly induced to confess to taking the money and to repay it on the basis that that would extinguish her misconduct.

12.2 The first respondent did not advise the applicant that making the confession might be detrimental to her or that she should get advice as she was entitled to.

12.3 These failures made the arbitrator doubt the reliability of the confession and the circumstances under which it was made meant it was "possible" that a promise was made that disciplinary charges would not be brought if she made the confession which consequently denied her the opportunity of defending the allegations against her irrespective of whether or not she had a case to answer to.

12.4 The employer should not have entrusted the first respondent with handling moneys if it knew about her previous misconduct.

[13] The arbitrator concluded that the first respondent's dismissal was procedurally and substantively unfair citing the following reasons:

13.1 The confession should only have been made at the disciplinary enquiry after she had been charged and that it was improperly induced.

13.2 The applicant had failed to present details of the Nedzama to justify its contention that the circumstances of his case were different from that of the first respondent. Consequently there was no basis for the unequal and inconsistent treatment of the first respondent.

13.3 The employer had also failed to consider the first respondent's personal circumstances namely: her twenty years' service, the fact that she is a single parent with maintenance responsibilities and without any tertiary qualifications or experience other than the experience gained working for the applicant, which made her prospects of alternative employment very slim or non-existent.

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Grounds of review

[14] The applicant raised a number of grounds of review. I address those which I consider more important below.

[15] Firstly, the applicant claims that the arbitrator misdirected himself by focusing on the issue of the confession rather than on the question whether or not she was guilty of the misconduct. In this regard, the applicant pertinently points out that it was not the first respondent's case that she did not take the money as she essentially admitted in her own evidence what she had done, irrespective of whether or not she would have confessed to it originally. Consequently, it cannot be said that she relied on the inadmissibility of her confession as the basis of her case. Moreover, her evidence was consistent with the original confession.

[16] I agree that there is a contradictory line of reasoning running through the arbitrator's award: on the one hand he believes the first respondent ought not to have been prejudiced by the evidence of her written confession and, on the other, he appears to accept that she was guilty of the misconduct. If he did not believe she was guilty of the misconduct his imposition of a final written warning is inexplicable. Accordingly, for all the emphasis he placed on the admission of the written confession, ultimately he accepted that the first respondent was guilty of the misconduct in question. Indeed, even if the evidence of the written confession is excluded entirely, it is obvious from her own testimony at the arbitration that the first respondent essentially confirmed that she had used some of the money she was supposed to deposit for personal reasons.

[17] However, I accept that it is conceivable that the arbitrator may have viewed the admission of the confession as an element of procedural unfairness rather than something which affected the substantive merits of the case against the applicant. Much of his discussion about the confession focuses on the fairness of allegedly extracting it from the first respondent before the enquiry was convened rather than it being done at the disciplinary enquiry itself. It must be borne in mind that a mere irregularity or misdirection must be one that takes the arbitrator's reasoning so off the right track that the arbitrator fails to deal with an issue

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that was necessary to arrive at a finding and that the arbitrator would have arrived at a different conclusion but for that misdirection.[1]

[18] While there is a degree of confusion in the arbitrator's analysis, it is not unreasonable for the arbitrator to have concluded on the evidence before him that the admission of the written confession admission was an issue that might have a bearing on procedural fairness and that the issue of the first respondent's guilt was still something that could be separately determined on the remainder of the evidence. Whether the arbitrator's treatment of the admission of the confession obtained before the disciplinary hearing following an investigation which revealed the first respondent's wrongdoing could reasonably have been taken into account in considering if it affected the procedural fairness of the first respondent's dismissal is discussed below.

[19] Secondly, the applicant contends that the arbitrator perversely or blamed the applicant for allowing her to handle moneys again rather than drawing the most obvious conclusion that despite a previous similar incident, she had misappropriated money again which was incompatible with reinstating her. I agree that the logic of the arbitrator in this respect is difficult to understand. It amounts to holding that if an employer continues to employ

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[1] See e.g ***Head of the Department of Education v Mofokeng and others*** **[2015] 1 BLLR 50 (LAC)** at 60-61, para [33]:

> "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."

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someone who previously misappropriated funds, its previous leniency will count against it when the same person misappropriates funds on another occasion. On this basis, the more an employer applies the principles of progressive discipline the less it will be able to justify ultimately imposing the sanction of dismissal. Instead, the arbitrator should have been considering how the applicant could be expected to retain the first respondent for misconduct entailing an element of dishonesty even if her dismissal was in some respects substantively unfair. The misdirection in his thinking caused by his inversion of the determination of fault in a misconduct dismissal led him to ignore the inquiry into the appropriate remedy he should have undertaken in terms of s 193(2) of the |LRA. Moreover, even if the arbitrator accepted that there was an element of inconsistency, the arbitrator did not even consider the additional evidence relating to the applicant's previous misappropriation of funds when deciding the question of consistency, when it was obviously a relevant factor in determining if the two cases were on a par with each other and would materially affect that evaluation. In any event, even if the finding of consistency must stand because of the limited basis on which the applicant attacked that finding on review, the applicant's point that the arbitrator drew an adverse inference against it rather than considering her previous misconduct as a relevant factor when deciding on whether the reinstatement was appropriate or not remains valid.

[20] Thirdly, the first respondent was represented in her disciplinary enquiry when she pleaded guilty yet did not challenge the use of her confession at that stage. This might well have been true but is not something which was clearly canvassed in the evidence before the Commissioner based on the limited record before me. Accordingly, I cannot make any finding on this ground of review.

[21] Fourthly, the arbitrator did not evaluate whether the first respondent's dismissal was procedurally unfair against the requirements of The Code of Good Practice: Dismissal in Schedule 8 of the Labour Relations Act 66 of 1995 ('the LRA'). Had the arbitrator done so on the face of the evidence narrated in his award he would have been compelled to conclude that her dismissal was procedurally fair. It is true that the arbitrator identified the

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principles of procedural unfairness outlined in Schedule 8. It is also apparent from his award that his reasoning relating to the confession bears no reference to these principles, yet it was the admission of the written confession which clearly weighed most heavily with him in deciding that there was procedural unfairness. In the circumstances, the enquiry he embarked on in relation to procedural fairness did not follow the guidelines in the code which he was obliged to consider and not merely to recite. None of those principles would seem to suggest that it was somehow procedurally unfair for the written confession to be admitted in the disciplinary enquiry in circumstances where there was no evidence that the first respondent was denied an opportunity wake-up to dispute its admissibility. On this basis alone, the arbitrator's conclusions in relation to the procedural unfairness of the first respondent's dismissal are not sustainable.

[22] Fifthly, the applicant maintains that the onus of proving inconsistent treatment fell on the first respondent and not on it. Consequently, it argues that the arbitrator misdirected himself in placing the responsibility on the first respondent to produce evidence to justify the differentiation between the first respondent's treatment and that of Nedzamba. It is not entirely clear from the arbitration award when the question of consistency was first raised in the course of the proceedings, but the arbitrator makes no mention of it having been put to the applicant's witnesses. On the face of the award, it seems most probable that it was only raised by the first respondent when she gave her evidence. The arbitrator mentions the other case for the first time in the following terms in the course of relating her evidence:

> "She also informed the arbitration about a similar case were (*sic*) another employee at Madzivhadila, Mr Nedzamba was not expelled or dismissed but was simply reprimanded by having a salary notch taken away from him."

Later in his evaluation of the case, the arbitrator stated the following when characterising the input of the applicant on the Nedzamba case:

> "The respondent did not dispute that such a case did occur, their version was as indicated also in their closing arguments was that Nedzamba did

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not plead in the manner that the applicant in the present case did, and the respondent also suggested without necessarily providing prove that the two case are not entirely the case."

(*sic*)

[23] On balance, it seems that the specific comparative case was not put to the applicant's witnesses under cross-examination, and that the arbitrator should at least have given the applicant an opportunity to lead additional evidence on that case in rebuttal. However, if under cross-examination the comparative case had been put to the applicant's witnesses in sufficient detail to raise a *prima facie* case of inconsistent treatment, the applicant would have had an opportunity to lead evidence to rebut that case before closing its case, and if it had failed to do so then the first respondent ought to have succeeded on this leg of the test of substantive unfairness. See in this regard, *Sappi Fine Papers (Pty) Ltd t/a Adamas Mill v Lallie & others*, where Landman J, as he then was, held:

> "As regards the onus, the onus of proving that the dismissal was fair, and thus of rebutting the allegation of inconsistency, is one which rests squarely on the employer."[2]

However, the applicant on review did not raise the issue of not being able to lead evidence in rebuttal of the comparative case mentioned by the first respondent for the first time in her evidence. Rather, it relied only on an erroneous argument about where the onus fell in proving consistent treatment. For the reasons discussed above, this ground of review cannot succeed. It also follows that the arbitrator's finding on inconsistent treatment must also stand even though it might have been set aside on different grounds.

[24] Sixthly, the arbitrator's finding that the sanction was too harsh is inconsistent with his view that the confession should not have been taken account of. I have already dealt with this inconsistency in relation to the first ground of review discussed above and discussion of this ground will essentially traverse the same issues.

[2] (1999) 20 *ILJ* 645 (LC) at 647 para 5

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Conclusion

[25] In summation, the arbitrator's finding that the dismissal was procedurally unfair must be set aside and the only basis for upholding a finding of substantive fairness rests on the applicant's unsuccessful attempt to review that finding on the ground it advanced. However, the arbitrator's failure to consider the implications of the applicant being involved in a prior misappropriation of funds, *albeit* a long time before, at least ought to have made the arbitrator pause to consider if this was a case where it was tolerable for the first respondent to remain in employment. The arbitrator having decided that the dismissal was substantively unfair simply assumed that the reinstatement was the remedy.

[26] Had the arbitrator considered this, the arbitrator would also have had to deal with the undisputed fact that the misappropriation of funds in 2005 was not something which the first respondent had volunteered, but which had only been discovered after an investigation was conducted into the discrepancy between monies received and monies banked. There was nothing on the evidence to suggest that she would have volunteered the shortage in the money she deposited if it had not been for the investigation. I agree with the applicant that in the circumstances, the arbitrator's reasoning with respect to the question of reinstatement is difficult to justify on any reasonable basis and at the very least the arbitrator should have limited his award to one of compensation, at best making allowance for the first respondent's long service.

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Order

In light of the above the following order is made:

[1] The first respondent's late filing of her answering affidavit is condoned.

[2] The following findings and relief in the second respondent's award dated 26 September 2006 issued under case number PSGA 1044-05/06 are reviewed and set aside:

2.1 The finding that the first respondent's dismissal was procedurally unfair.

2.2 The disciplinary sanction of a final written warning.

2.3 The reinstatement of the first respondent with effect from 15 October 2006.

[3] The said findings and relief set aside above are substituted with the following findings and relief:

3.1 The first respondent's dismissal was procedurally fair.

3.2 Within fifteen days of receipt of this judgement, the applicant must pay the first respondent twelve months' remuneration calculated at her monthly rate of remuneration at the time of her dismissal.

[4] In the event the parties are unable to agree on the applicant's monthly rate of remuneration in paragraphs 3.2 above, either party may apply to the court to determine this issue.

[5] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	D T Skosana, SC instructed by the State Attorney
FIRST RESPONDENT:	S O Ravele of SO Ravele Attorneys (*appearing pro bono*)

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