



Of interest to other judges

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

Case no: JR 2220/15

In the matter between:

**SOUTH AFRICAN MUNICIPAL WORKERS
UNION**

First Applicant

SIMON BHENGU

Second Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

First Respondent

ERIC MYHILL, N.O.

Second Respondent

**CITY POWER JOHANNESBURG SOC
LTD**

Third Respondent

Heard: 18 May 2017

Delivered: 10 July 2018

Summary: (Review – reasonableness – invalidity of appeal ‘decision’ not a ground for substantive unfairness on facts of the case – Sars’s cases distinguishable on the facts)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an application to review an arbitration award. The application was filed late but the late filing was condoned in an earlier judgement of the court.
- [2] The arbitrator found the dismissal of the second applicant, Mr S Bhengu ('Bhengu') substantively fair but procedurally unfair and awarded him three months' remuneration as compensation.

Background

- [1] Bhengu was charged with six grounds of misconduct related to an incident on Sunday 19 May 2013 where he had allegedly, in his private capacity and without the necessary authorisation, connected the electronic sign of a customer ('Adpost') of the third respondent, City Power. The work should have been conducted by a depot of City Power falling under a different region from the one in which Bhengu was a regional manager.
- [2] At his disciplinary enquiry, he pleaded guilty to the first two charges, namely:
 - 2.1 contravening clause 9.1 (g) of the disciplinary code by unlawfully misappropriating city powers property, wilfully or negligently damaging it and permitting it to be used in proper or an authorised manner in that he was found by a security company reconnecting a customer, Adpost, without authorisation or documentation.
 - 2.2 Contravening clause 9.1 (l) of the code by conducting himself in a disgraceful, unbecoming and dishonest manner prejudicial to the good proper working of City Power's services by conducting himself in the manner described in the first charge.
- [3] The chairperson of the disciplinary enquiry also found him guilty of charges 3, 4 and 5, but acquitted him of the last charge which was failing

to declare his ownership of an entity, Simelane Electrical CC, which was registered in his name, in City Power's register for declaration of interests. In summary, the other charges Bhengu was found guilty of in the disciplinary were:

- 3.1 that contrary to clause 9.1 (g) of the code he had misappropriated City Power property by allowing non-City Power employees to wear City Power reflected jackets while working on City Power's network (charge 4);
- 3.2 contrary to clause 9.1 (l) of the code he had conducting himself in a disgraceful, unbecoming and dishonest manner prejudicial to the good proper working of City Power's services by undertaking to provide the necessary documentation proving that he had authority to perform the work in question when he knew he had none (charge 5), and
- 3.3 that he contravened clause 9.1 (l) of the code by working on the City Power network in his private capacity and outside the region he was supposed to work in. The applicant worked in the Roodepoort area whereas the substation where the incident occurred fell in Booyens under the Reuven depot of City Power.

[4] On 21 October 2013, the chairperson recommended Bhengu's dismissal, principally on the basis that he had committed an act of misappropriation and dishonesty by:

- allowing interference of the City Power network without prior approval and by saying he will produce documentation the following day and never did,
- allowing non-City Power workers and appointed by him, to wear City Power reflective vests,
- allowing non-City Power workers to work for him on city powers networks,
- allowing work to be carried out under his instructions outside his geographical area of responsibility.

The chairperson also found that even though there was no evidence of any personal financial gain made by Bhengu, it was highly improbable he would have executed such work for a third party without receiving some kind of financial benefit.

[5] On 21 January 2014, Bhengu was issued with a letter signed by the managing director, Mr S Xulu ('Xulu'), confirming the outcome of the disciplinary enquiry and that "(a) decision was taken to terminate your services with City Power Johannesburg". On 26 January 2014, Bhengu appealed against the findings of guilt and the sanction.

[6] An appeal hearing was convened before Mr L Matsheketsheke ('Matsheketsheke'), who made the following recommendation on 23 July 2014, in after considering the appeal:

Recommendation

Having regard to the circumstances of this case and the nature issues raised by the appellant, I am of the strong belief in view that the employer's decision of DISMISSAL in this case must be reviewed.

It is in the light of the above reasons under the conclusion that I am recommending that the application for leave to appeal be upheld and the decision to dismiss Mr Solomon Bhengu from the employment of City Power be reviewed to a final written warning.

The final written warning comes with a condition that Mr Solomon Bhengu must not commit that same misconduct for a period of one year and that he must be automatically dismissed if he commit that same offence within the one-year period from now.

[7] Matsheketsheke found that the chairperson of the enquiry had contradicted himself in first finding that there was no evidence of personal financial gain, but then finding that it was improbable he would have reconnected Adpost's sign without obtaining some financial benefit. Although it was not explicit in the reasoning of the hearing chairperson's findings, Matsheketsheke also believed that the fact that Bhengu was an Area Manager, should not have been considered an aggravating factor in recommending his dismissal.

- [8] Approximately nine months later, on 27 March 2015, the Managing Director of City Power asked Bhengu to address him in writing on the issue of mitigation of the sanction in a letter, viz:

Appeal: Dismissal

You were employed by City Power as an Area Manager in Roodepoort. On 22 October 2013 your services with City Power was terminated following a disciplinary hearing.

On 26 January 2014, you lodged an appeal against the outcome of the disciplinary hearing. I have taken advice on the recommendation emanating from the appeal hearing and before reaching a final conclusion I would like to be addressed by you on the issue of mitigation of the sanction.

I am hereby affording you an opportunity to submit written submissions regarding any mitigating factors including personal circumstances which you would like me to take into consideration.

...

- [9] The managing director then issued a “formal outcome of the appeal” on 20 May 2015. In the detailed reasons provided for the outcome, the managing director reviewed the findings of the disciplinary enquiry and the appeal hearing. He rejected the recommendation of the appeal hearing chairperson and confirmed the sanction of dismissal on the basis that Bhengu had been dishonest. Clause 9.15.5 of the disciplinary code states:

After considering the record of the proceedings, documentation and exhibits, in the address and representation referred to in clause 9.15.3¹ and the findings and recommendations referred to in that clause if any and having heard the parties in their presence, the managing director shall decide on the appeal, they allow the appeal or rejected wholly or partly and may make such findings and impose such a penalty deems fit.

- [10] Clause 9.7.1 of the code provides that a formal enquiry must be conducted by the managing director or the managing director's nominee, subject *inter alia* to the requirement that “... the decision as to conviction or acquittal shall be that of the managing director or his nominee only.”

¹ Clause 9.15.3 refers to the furnishing of a record of the enquiry to the employee and the managing director if an appeal is lodged.

The award

[11] The arbitrator's award set out the evidence and his analysis in some detail.

[12] The thrust of Bhengu's defence at the arbitration was essentially six-fold. Firstly, he denied that he had pleaded guilty to the first two charges at the disciplinary enquiry. Secondly, it was possible to do work on the network without a job card in certain circumstances and that authorisation could be obtained afterwards. He claimed that he had intended to obtain a job card the following day after the incident but had been disturbed by having to make a statement and then receiving the charge sheet a few days later. He admitted to assisting Adpost because the client had phoned him to complain that the advertising board had no power. When he arrived at the mini substation he found two of Adpost's employees already there, but they did not know how to fix the problem and he assisted them. In relation to the charge of allowing and Adposts' employees to wear City Power reflective vests, he claimed that he had not particularly noticed if the reflective vests they wore were City Power vests, because he had been concentrating on assisting them. In any event, he had no control over how they could have acquired the vests, which were generally available. He denied there was any policy which prevented him from assisting in an area outside the scope of his authority. As an area manager he was allowed to attend to a call in another area without the authority of the area manager responsible for that area.

[13] The arbitrator's main findings relating to the charges may be summarised as follows:

13.1 On whether or not Bhengu had pleaded guilty to the first two charges, the arbitrator found that based on what was recorded in his appeal application, the evidence of employee relations officer who attended the disciplinary enquiry and the outcome of that enquiry in which the chairperson recorded his admission to those charges, the arbitrator found the evidence was overwhelming that he had pleaded

guilty to them. Consequently, he was not telling the truth when he denied doing so, which negatively affected his credibility as a witness.

13.2 Bhengu did not damage any property of City Power but did misappropriate it when he accessed the mini substation and reconnected Adpost's cable without authorisation and the necessary documentation. He did so in a manner that was dishonest and prejudicial to the good and proper working of City Power's services. In this regard, the arbitrator found that even Bhengu's own witnesses' versions did not support his contention that it was possible for someone to perform work without obtaining a job card or without the authority of the person in charge of the region in question. The investigating officer had also testified that the only persons who could authorise Bhengu to perform such work would be the general manager or a director of the division. The arbitrator further took account of the fact that it made sense for City Power to divide its operations into separate areas with different people having authority over such areas: if a manager in one area could simply take it upon himself to attend to customer requests in other areas it would result in chaos.

13.3 A major difficulty with Bhengu's evidence was that, in the statement he made under oath to the investigating officer the day after the incident, he claimed that he had received a call from Adpost to assist in reconnecting its advertising board and that he did not need a job card for the work because Adpost was not a contractor to City Power. This flatly contradicted his subsequent evidence that he was required to obtain a job card and had intended to do so but failed to because of the investigation and being charged in the days following the incident. The arbitrator accepted that he might have been upset by being taken to the Reuven depot by the security company, but that did not explain his failure to obtain a job card subsequently unless Bhengu "...either did not see the need to obtain one or did not believe he would obtain one, owing to management in the Booyens area not having authorised the job he did". The arbitrator found that

the latter explanation was most likely because it would have been simple to have rectified the situation by obtaining the job card after the event and he had more than a month to recover between becoming upset about being taken to the Reuven depot at the time of the incident and the time he was charged.

13.4 As a senior official and Area Manager with twelve years' experience, Bhengu was aware he needed authorisation from management in the Booysen's area. By doing what he had done, he had misrepresented that he had the necessary authority, which was dishonest.

13.5 The arbitrator concurred with the findings of the chairperson of the disciplinary enquiry and the Managing Director.

[14] The arbitrator also considered in great detail what the appropriate sanction should be and drew the following conclusions in determining that dismissal would be appropriate:

14.1 The arbitrator endorsed the opinion of the managing director that dishonesty could warrant dismissal even where it was a first offence, even if there was no proof of any financial benefit and that an employee in a senior position could be held to a higher standard of trust and compliance.

14.2 In considering the application of the principles in item 3 (4) of schedule 8 of the Labour Relations Act, 66 of 1995 ('the LRA'), the arbitrator concluded that the aggravating factors outweighed the mitigating ones. In this regard he found the following relevant:

14.2.1 Bhengu was in a position of trust, which she abused when he used his ability to access the substation and reconnect the advertising board without authority to do so.

14.2.2 The fact that unauthorised and illegal reading connections of electricity clearly create the potential for financial loss to be suffered by the respondent though there was no evidence this occurred in this instance.

14.2.3 Bhengu showed no remorse for his conduct, which was an important factor in deciding if he could reasonably be trusted again.

14.2.4 Bhengu untrustworthiness was also illustrated by his continued dishonesty in the arbitration.

14.2.5 The factors above outweighed the fact that it was a first offence and that he had a good record of 12 years' service.

[15] The arbitrator found that Bhengu's dismissal was procedurally unfair because the managing director ought to have invited him to address him on the issue of the appeal chairperson's recommendations before deciding to reject them, and Xulu had delayed excessively in rendering his decision on the appeal nearly a year after the chairperson of the appeal hearing had made his recommendations. However, as this finding is not the subject matter of the review application, it is not necessary to deal with this.

Grounds of review and evaluation

Grounds of review

[16] The court is only concerned with the grounds of review raised in the pleadings and not with any additional grounds raised in the heads of argument.² Bhengu raised a number of different grounds of review. Firstly, he questions the reasoning of the arbitrator on the basis that he failed to consider certain evidence in concluding that he was dishonest. Secondly, that by endorsing the findings of the chairperson of the enquiry and the managing director, the arbitrator failed to approach the arbitration as a *de novo* hearing. Thirdly, that the arbitrator misdirected himself by applying the wrong test in determining the appropriate sanction by basing that on dishonesty, when it should have been apparent that the real reason for his dismissal was not dishonesty but simply a failure to follow standard operating procedures. The arbitrator improperly concluded that the

² See **Comtech (Pty) Ltd v Molony NO and Others** (DA12/05) [2007] ZALAC 40 (21 December 2007) at para [15].

connection of Adpost's billboard was an illegal or unauthorised connection. The arbitrator misdirected himself in treating the determination of the appropriate sanction as if he was considering an appeal, because he did not independently consider the appropriateness of the sanction but deferred to the decision of the chairperson of the enquiry. Had he considered all the factors including the fact that he continued to work for City Power for a period of eight months after the offence and his family responsibilities, he could never have come to the conclusion he did. There was no evidence from City Power to the effect that he could not be trusted.

- [17] In his supplementary affidavit, Bhengu went further and contended that the arbitrator failed to consider whether the managing director had the power to dismiss him following the recommendation of the appeal hearing chairperson. In truth, the applicant submits, the managing director only had the power to consider whether or not to accept the recommendation of the chairperson of the original disciplinary hearing. The failure to adhere to the recommendation of the chairperson of the appeal hearing, whom the managing director had nominated to determine the appeal in his stead, was such a fundamental procedural irregularity that the arbitrator ought to have found that it rendered his dismissal not only procedurally but also substantively unfair. Bhengu concluded “(o)n this ground alone, the arbitrator’s award fails the reasonableness test and therefore should be reviewed and set aside. Secondly, Bhengu submits that the failure of City Power to call the managing director, who had taken the decision to dismiss him, was fatal because his evidence was necessary to prove that his dismissal was warranted. Lastly, he contends that the managing director had decided that there was a breakdown of trust on the basis of a legal opinion rather than the existence of any facts and therefore the arbitrator could not reasonably have concluded that the sanction of dismissal was appropriate.

Evaluation

- [18] In relation to an arbitrator's alleged failure to consider certain factors or mis-directions, it is necessary for the applicant on review to demonstrate that the failure in question necessarily led the arbitrator to make findings

which no reasonable arbitrator could have made on the evidence before them. In ***Head of Department of Education v Mofokeng and Others***³ the Labour Appeal Court stated:

[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 enquiry. 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 enquiry, 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.

[19] The applicant's claim that by endorsing the findings of the chairperson of the enquiry and the managing director, the arbitrator failed to approach the arbitration as a *de novo* hearing, is hard to credit as a serious ground of review. Anyone reading the arbitration award would realise that his 'endorsement' of those persons' decisions was simply another way of saying that there was an overlap between his conclusions and their conclusions. It is quite obvious that he considered the evidence before him

³ (2015) 36 ILJ 2802 (LAC) at 2813

and drew conclusions based on that evidence. Nothing in his reasoning suggests he believed he was engaged in an appeal process.

- [20] In relation to the finding of dishonesty, the applicant seeks to suggest that the finding of dishonesty was based simply on whether or not there had been a misappropriation of City Power's property. Firstly, the arbitrator's conclusion that there had been misappropriation was based on the fact that he concluded that Bhengu had accessed the substation to reconnect Adpost's advertising board without the necessary authority and because it was unauthorised it constituted improper use of City Power's property. I fail to understand why that cannot be construed as misappropriation.
- [21] In any event, the finding of dishonesty was not simply based on Bhengu facilitating the reconnection of Adpost's signed without authority. As the arbitrator stated: " I am also satisfied that he did this [i.e improperly used the property] in a dishonest manner ...". It is clear from the award that the dishonesty related to Bhengu's representation to the security officers that he had the necessary authority to perform the work and that he would obtain a job card afterwards. The arbitrator found that his explanation that he did not get round to obtaining the job card owing to being upset about being taken to the Reuven depot and making a statement was not plausible and that the more plausible explanation was that he knew he would not obtain a job card because the work was not authorised. Clearly that was also the underlying issue behind Charge 5.
- [22] For this reason also, the submission that Bhengu's misconduct simply concerned a failure to follow standard operating procedures is plainly inaccurate and consequently, it was not incorrect of the arbitrator, or for that matter the chairpersons of the disciplinary enquiry and the managing director to identify dishonesty as an issue. Having initially implied that authority had been granted and proof of authority would be obtained, his defence shifted to arguing that he was authorised by virtue merely of his position as an Area Manager, even though he was working on City Power equipment in an area outside his authority, or alternatively that it was not necessary doing work for a client of City Power. Even his own witnesses confirmed the importance of obtaining a job card for performing work.

- [23] In relation to the absence of specific evidence of management's inability to trust him in future, was it unreasonable for the arbitrator to make a finding on his trustworthiness in the circumstances? Bhengu was in a senior position. He clearly was of the view he had done no wrong by accessing a sub-station outside his area of authority without even notifying the area manager in charge. His failure to admit any wrongdoing or regret strongly indicates he felt he was fully justified in his actions. In the circumstances, what evidence was there that he was unlikely to do something similar in the future? It may be true he continued to work while City Power took excessively long to finalise his case, but it does not follow that a relationship of trust existed or had been restored. I believe the arbitrator was not unreasonable in concluding that, given his seniority, his dishonesty was an important factor in determining an appropriate sanction.
- [24] Insofar as the arbitrator equated the re-connection of Adpost's billboard with an illegal or unauthorised connection, I agree the arbitrator misconstrued that evidence, but leaving aside that inference it does not mean his decision could not be sustained on the evidence before him.
- [25] Whether or not the managing director acted *ultra vires* in finally imposing a sanction of dismissal and therefore rendered Bhengu's dismissal substantively unfair raises a more serious challenge, though it has little to do with the intrinsic merits of whether it was appropriate to dismiss him.
- [26] In ***County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others***⁴ the Labour Appeal Court upheld a finding that a dismissal was procedurally unfair where the employer had interfered with the findings of the chairperson of the disciplinary enquiry in the absence of any express provision in the disciplinary code which permitted such interference.⁵ Subsequently, the LAC has held in two judgements, namely ***SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others***⁶ (the 'Chatrooghoon' case) and ***SA Revenue Service v Commission for Conciliation,***

⁴ (2003) 24 ILJ 355 (LAC)

⁵ At 360-1, paras [21] –[23].

⁶ (2014) 35 ILJ 656 (LAC)

Mediation & Arbitration & others⁷ (the 'Kruger' case), that where a decision is taken to dismiss an employee but the decision maker lacks legal authority to take the decision, that renders the decision unfair.

[27] In *Chatrooghoon*, the LAC found that the employer had acted *ultra vires* the disciplinary code and collective agreement in substituting its own decision for that of the chairperson of the disciplinary enquiry, who imposed a sanction of fifteen days' suspension without pay and a final written warning. The arbitrator had also found that there was no basis for finding the trust relationship had broken down.⁸ The LAC decided that the sanction of the chairperson was the final one and not a mere recommendation.⁹ Although the judgement did not starkly delineate its analysis of procedural and substantive fairness, the logic of the judgement makes it clear that in the circumstances, SARS was bound by the decision of the enquiry chairperson who decided that dismissal was not appropriate and therefore the employer could not defend a subsequent decision to impose a sanction of dismissal.

[28] In *Kruger*, the LAC reaffirmed the reasoning in *Chatrooghoon*. In upholding the decision of the Labour Court, the LAC stated:

[28] Pillay J thereupon held that the arbitrator's decision that the dismissal of Mr Kruger, by means of a substituted sanction based on a non-existent authority to make such a substitution, was not unreasonable and dismissed the review application. The 'merits' of the allegations of misconduct did not affect that decision and Pillay J, correctly, did not deal with the arbitrator's treatment of that topic. In my view, that approach by Pillay J was correct because once the dismissal decision was up-ended on grounds of invalidity, there was no need to enquire further, and indeed no logical room or justification, to entertain an enquiry into that subject-matter. The arbitrator, who did so, was misled into undertaking such an enquiry, and ultimately regardless of the factual findings, they could have no impact on

⁷ (2016) 37 ILJ 655 (LAC)

⁸ At 661, para [13]

⁹ At 664, para [24].

the ratio in the award; i.e the substituted sanction was invalid and for that reason the dismissal was unfair.¹⁰

(emphasis added)

- [29] The LAC also considered the employer's contention that the finding of unfairness in such instances should be confined only to the question of procedural fairness but that the substantive merits of whether a dismissal was warranted by the misconduct could still be entertained. After a long excursus, the court unequivocally held that the invalidity of a subsequent decision by an employer to dismiss an employee contrary to an earlier valid decision is fatal and disposes of the need for a separate enquiry into the substantive fairness of the dismissal based on the underlying merits:

[42] Thus, in my view, it must follow that if the substitution of a sanction is invalid, as found in Chatrooghoon, that invalidity vitiates the act completely; ie it cannot be made. Invalidity is more than procedural unfairness, it denotes an unlawful act; ie one the law will not acknowledge. Accordingly, in my view Pillay J was correct to hold that an invalid substitution of a sanction was not merely an instance of procedural unfairness that might leave open a space for a parallel enquiry into the appropriateness of a remedy for such a 'procedural' mishap and, in turn, allow space to address the gravamen of the misconduct per se. Similarly, the contention that the judgment of Ndlovu JA, in Chatrooghoon, has application only to procedural unfairness cannot succeed because the force of those dicta by Ndlovu JA is that a substitution of a sanction without a lawful foundation is not merely unfair for want of a procedural authorisation, but is invalid.

- [30] The question then in this case is: when was a valid decision on disciplinary action taken? Was it the last decision taken by the managing director, who rejected the recommendation of the chairperson of the appeal hearing, or should the recommendation of the chairperson of the appeal hearing be found to have been the final and valid decision? The relevant provisions of the disciplinary code, which it was common cause was a collective agreement and binding on City Power, are:

9.3 When an allegation of misconduct is made against an employee, the Managing Director shall within six (6) working days of the alleged

¹⁰ At 667.

misconduct being made known, either himself investigate the allegation, or designate another person to investigate the allegation and report the result of such investigation to him.

9.4 Within six (6) working days of the managing director commencing an investigation, or a person being designated in terms of clause 9.3, or within such longer period as the Managing Director may allow, the Managing Director shall decide whether an enquiry should be instituted and if so, the Managing Director or person designated shall cause a written charge to be drawn up in which - ...

...

9.6 If an employee admits that he is guilty of such misconduct as set out in a charge served on him in terms of clause 9.5, the Managing Director may after having given the employee or his representative the opportunity of leading evidence and addressing him in mitigation, find such employee guilty of misconduct and impose a penalty subject mutatis mutandis to the provisions of clause 9.14.2 9.14.3.

9.7.1 a formal enquiry into any unresolved charge shall be conducted by the managing director or his nominee, who may be assisted in evaluating the evidence did in the hearing by not more than two assesses, who may include a member of City Power Johannesburg's legal stop, subject to the following conditions –

a) the decision as to conviction or acquittal shall be that of the managing director or his nominee only; ...

...

9.14.1 If at an enquiry, the employee charged is found guilty of misconduct, and a person other than the Managing Director was the presiding officer, such officer shall, within two (2) working days, or such longer period not exceeding five (5) working days allowed by such managing director, submit a report to such Managing Director sitting out in motivating his findings and the penalty which he deems appropriate.

9.14.2 The Managing Director shall, after having conducted an enquiry and having found the employee charged, guilty or having received and considered a report by the presiding officer in terms of clause 9.14.1, which report should include any plea in mitigation, impose a penalty,

9.14.3 The Managing Director shall forthwith in writing notify the employer concerned and the Director: Corporate Services of the penalty imposed by him ...

9.15.1 An employee who has been convicted and in respect of whom a penalty has been imposed or proposed as contemplated in clause 9.6 May within five (5) working days after the date of such imposition, or the date on which he was advised of the conviction or proposed penalty, as the case may be, appeal against such conviction, the penalty or proposed penalty or both by lodging a written notice of appeal with the Managing Director.

9.15.2 An appeal hearing lodged in terms of 9.15.1 shall be heard within 10 (10) working days of the date on which such appeal is lodged.

9.15.3 If an appeal is lodged in terms of clause 9.15.1, the director concerned shall, on request, forthwith submit to the managing director and to the employee and the written reasons for the conviction, penalty or recommendation.

9.15.4 The person designated in terms of clause 9.7.1 [the managing director or his nominee] may address the managing director in support of his findings and recommendation at the enquiry and submit written representations and the appellant with or without his representatives shall have the right to address the managing director on such oral and written representations, and to submit written representations, to which the designated person shall have a right of reply.

9.15.5 After having considered the record of the proceedings, documentation and exhibits, any address and representations referred to in clause 9.15.3 and the findings and recommendations referred to in that clause, if any, and having heard the parties in their presence, the managing director shall decide on the appeal and may allow the appeal or reject it wholly or partially and make such findings and impose such penalty as he deems fit;

...

9.23 for the purpose of this Chapter¹¹, Managing Director and unless the context otherwise indicates, every reference to the Managing Director shall include a nominee of the Managing Director.

¹¹ This is a reference to chapter 9 of the agreement which contains the code.

- [31] Bhengu's submission in his supplementary affidavit is that, having chosen to appoint Matsheketsheke as the chairperson of the appeal hearing, his "recommendation" in fact amounted to a decision of the Managing Director, who was not at liberty to change it. Moreover, there was no provision in the disciplinary code, which allowed the managing director to reconsider the decision of the appeal chairperson. Insofar as the managing director has a discretion under the code, that discretion is limited to whether or not to accept the recommendation of the chairperson of the initial disciplinary enquiry contemplated under clauses 9.14.1 to 9.14.3. City Power argues in terms of clause 9.15.5 it was clear that the decision on any appeal still lay ultimately with the Managing Director.
- [32] I agree that insofar as the decision of the disciplinary chairperson was concerned that, in terms of the provisions of clause 19.14.1, it is clear that his findings on the question of guilt and his recommendations on an appropriate penalty are to be submitted to the managing director. In terms of clause 19.14.2, the managing director may then impose a sanction. The employee is then entitled under clause 9.15.1 to submit an appeal against both the conviction and sanction to the managing director. By 21 January 2014, Bhengu's conviction and sanction had been determined and imposed, subject to his right of appeal which he then exercised.
- [33] The appeal hearing was then convened with Matsheketsheke as the chairperson. Obviously, he was not the managing director, Xulu. However, it is clear that he was fulfilling the role of the managing director in presiding in the appeal hearing. Moreover, clause 9.23 specifically provides that the reference to the managing director in clause 9.15 would also include his nominee. That is the only capacity in which Matsheketsheke could have been sitting. Accordingly, he was required to perform the functions of the chairperson of that hearing in the Managing Director's stead.
- [34] The code makes no provision for the chairperson of the appeal hearing to make a recommendation, but requires him or her to decide the appeal. Moreover, the code makes no provision for any person other than the chairperson of the appeal hearing to decide the appeal. As such, Xulu had

no power to reject Matsheketsheke's recommendations and substitute them with his own decision. This is unlike *Chatrooghoon's* case, where SARS altered a chairperson's decision, not a recommendation. All Xulu could have done was insist that Matsheketsheke take the appeal decision himself. Nevertheless, the upshot of all of this is that no decision, as such, was made on Bhengu's appeal. That means the last competent decision taken under the code was that of the enquiry chairperson, which was properly confirmed by Xulu under the provisions of clause 9.14.2, before the appeal was lodged. In substance, the reasoning of the enquiry chairperson's decision was the same that City Power argued in support of in the arbitration proceedings, because Xulu's 'review' of Matsheketsheke recommendation endorsed the enquiry chairperson's approach. In conclusion, the invalidity of Xulu's purported decision on Bhengu's appeal does not render the dismissal invalid as it did in the SARS cases and so does not impact on the reasonableness of the arbitrator's findings on substantive fairness

- [35] On the question whether or not the arbitrator failed to see that the failure of City Power to call Xulu to defend the reasons for dismissing him, this ground has no merit. As the applicants themselves point out the hearing before the arbitrator was a hearing *de novo*. The arbitrator was not reviewing the employer's decision, but deciding if it had made out a case on the evidence presented at the arbitration that warranted upholding the dismissal as fair. That process does not require a party to lead the evidence of the person who took the decision, though it might be customary to do so.

Conclusions and Costs

- [36] In summary, for the reasons above, I am not satisfied the applicants have established grounds of review that warrant the court setting the award aside.

[37] On the question of costs, I accept that the application was *bona fide* and not frivolous. In the circumstances, justice and fairness do not warrant an adverse cost order against the applicants.

Order

[38] The review application is dismissed.

[39] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

I Savant of Cheadle,
Thompson & Haysom Inc.

RESPONDENT:

A L Cook instructed by
Zebedilia Inc.