



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1345/14

In the matter between:

SUPREME POULTRY (PTY) LTD

Applicant

and

LEBOGANG PETRUS MOKGETHI

First Respondent

COMMISSIONER MABEL SIKITI

Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Third Respondent

Heard: 19 April 2017

Delivered: 13 September 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] The first respondent (Mr Mokgethi), was employed by the applicant (Supreme) in October 1998 and was dismissed on 3 April 2014 on the grounds of misconduct related to gross insubordination. Having referred an alleged unfair dismissal dispute to the third respondent, the Commission for Conciliation and Arbitration (CCMA), the dispute came before the second respondent (Commissioner) for arbitration, who had found that the dismissal was

procedurally and substantively unfair. Supreme was ordered to reinstate Mokgethi, and to further pay to him, an amount of R22 500.00 in back-pay.

- [2] Supreme seeks an order reviewing and setting aside the Commissioner's arbitration award. Mokgethi, through the assistance of the SASLAW Pro Bono office has opposed the review application.

Background:

- [3] Supreme conducts business in the poultry industry. Mokgethi was employed as a stock controller/supervisor, and the allegations against him were that he used foul language towards a senior employee at the Viljoenskroon Cold Store site, by uttering words to the effect that: *"jy is nie my fokken speel grond en jy is nie my fokken baas nie."*
- [4] A disciplinary enquiry convened found Mokgethi guilty, and he was dismissed. At the arbitration proceedings, he challenged both the substantive and procedural fairness of his dismissal. Three witnesses had testified on behalf of Supreme before the Commissioner. Ettienne Erwee, Supreme's Section Head at the site where the incident took place testified that on 19 March 2014, an argument had ensued between Mokgethi and the Despatch Coordinator, Hornsby. When Erwee intervened, Mokgethi in an aggressive manner and with an attitude, in return uttered the verbal abuse attributed to him. Erwee further testified that Mokgethi had over the years developed an 'attitude' and had been disciplined for his conduct.
- [5] The second witness. Willem Hornsby's testimony was that Mokgethi reported to him. He had known Mokgethi for two months before the incident that led to his dismissal. He testified that the argument with Mokgethi was related to warnings he had issued to him on 18 and 19 March 2014 in regard to work performance. Mokgethi had confronted him as he sought to have the warning of 18 March 2014, which was to be valid for 12 months, reviewed or reduced. It appeared that Mokgethi did not understand what Hornsby was attempting to convey to him. When Erwee intervened and attempted to explain to Mokgethi what was being said to him, Mokgethi uttered the words attributed to him.

- [6] Supreme's Section Supervisor, Thabo Mnyaka also confirmed that he was present and had heard the argument between Erwee and Mokgethi. He testified that Mokgethi, whilst Erwee was attempting to explain something to him, hurled abusive language at him in a raised and disrespectful voice. This was at the time that Erwee was attempting to tell him that he was talking to Hornsby and not him. Mnyaka's view was that Mokgethi's behaviour was unacceptable and contrary to company rules which were well known to all employees.
- [7] Mokgethi's testimony was essentially that on 18 March 2014, he was busy performing his tasks. He made an error by writing a wrong date on a pallet. Hornsby called him to an office and informed him that he was to be 'charged'. He was then issued with a warning valid for twelve months.
- [8] The following day he had worked on pallets, wrote on them and loaded them on a truck. Hornsby again called him to his office and told him that he was to be 'charged' for incomplete work. Mokgethi protested that he was working alone, was overworked and also expected to train another driver. Nonetheless, Hornsby at a later stage called him again to his office where he was issued him with a further final written warning in the presence of Mnyaka and Erwee. He then attempted to address Hornsby but Erwee had intervened. It was when Erwee continued to intervene despite his attempts to address Hornsby that Erwee told him in Afrikaans that he was his boss. Mokgethi responded by saying that *'ek is nie jou speelgrond en jy is nie my boss'*. He had denied using foul language when speaking to Erwee.
- [9] Mokgethi further denied that there was any argument between him and Hornsby, or that he was angry, aggressive or had raised his voice when addressing him. He further denied that his body language displayed disrespect. He testified that he was merely discussing the issue of the warnings with Hornsby, and contended that all the witnesses had lied and the allegations against him were all a set-up to get him dismissed, so that Mnyaka could take over his position as supervisor.

The award:

- [10] In regards to substantive fairness of the dismissal, the Commissioner having heard the evidence and considered Item 7 of the Code of Good Practice, found that there was indeed a rule regulating conduct in the workplace. However since there was never an instruction issued to Mokgethi by his superiors, the charge of gross insubordination was misplaced. The Commissioner's reasoning was that there was a difference between insubordination and insolence, with the former being a more serious offence.
- [11] According to the Commissioner, Supreme did not show or prove that Mokgethi 'deliberately insulted the Respondent', and the charge of insolence would not have warranted a dismissal as there was further no evidence to suggest that the continuation of the employment relationship was impossible. Since Supreme failed to prove on a balance of probabilities that Mokgethi was guilty of insubordination, the dismissal was not only substantively unfair but was also harsh.

The grounds of review and evaluation:

- [12] Supreme contends that the Commissioner's award is reviewable on various grounds including that she committed a gross irregularity by failing to apply her mind to the evidence of its three witnesses in respect of the charge that led to the dismissal; failed to appreciate that the offence in question was serious and thus dismissible; failed to take into account that Mokgethi had previous warnings against his employment record, and failed to make credibility findings. It was submitted that the Commissioner made findings that were not of a reasonable decision maker, and which were irrational.
- [13] In opposing the review, it was submitted on behalf of Mokgethi that the findings made by the Commissioner in regards to the alleged offence were legally and factually correct; that there was no need for the Commissioner to make a credibility finding in the light of the correct recordal of the evidence of each witness, and further since the charge of insubordination was found to be misplaced; that the Commissioner's analysis of the applicable law was correct, and that there were no grounds presented to indicate why the decision of the Commissioner was unreasonable.

Evaluation:

- [14] The test on review is well established, and it is whether the decision under review is one that a reasonable decision-maker could not reach on the evidential material available¹. Central to the determination of the dispute before the Commissioner was whether Supreme had discharged the onus of proving that Mokgethi was insubordinate as a result of uttering the words attributed to him, and if so, whether the sanction of dismissal was appropriate.
- [15] The Commissioner's starting point was to make a distinction between the offences of gross insolence and gross insubordination. She had regard to Grogan's *Workplace Law* (no full citation), and concluded that to justify a dismissal, the insubordination must be serious, persistent and deliberate, and that the employer should adduce proof that the employee had in fact defied an instruction. Insolence according to the Commissioner justified dismissal only if it was wilful and serious. The Commissioner concluded that Supreme had

¹ See *South African Breweries (Pty) Ltd v Hansen and Others* (2017) 38 ILJ 1766 (LAC); [2017] 9 BLLR 892 (LAC), where the review test was summarised as follows;

"[10] The test that the Labour Court is required to apply in a review of an arbitrator's award was settled by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*: It is that an arbitration award is reviewable if the decision reached by the arbitrator was one that a reasonable decision-maker could not reach. Essentially, this test requires the Labour Court, sitting as a court of review, to enquire whether the decision under review is one that a reasonable decision-maker could not reach on the evidential material available. On this test, an arbitration award based on defective reasoning by an arbitrator may still pass the muster required in reviews, provided that the result is one that a reasonable decision-maker could have reached. This was clarified by the Supreme Court of Appeal in *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)* as follows:

'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii) ...the Arbitrator must have misconceived the nature of the inquiry 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, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

- [11] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (Gold Fields)*, this Court refined the *Sidumo* test by introducing a two-stage enquiry. In short, this requires the Labour Court to consider two issues: The first is whether the applicant has established an irregularity. This irregularity could be a material error of fact or law, the failure to apply one's mind to relevant evidence, or misconceiving of the enquiry or assessing factual disputes in an arbitrary fashion. The second is whether the applicant has established that the irregularity is material to the outcome by demonstrating that the outcome would have been different having regard to the evidence before the arbitrator. An arbitration award will, therefore, be considered to be reasonable when there is a material connection between the evidence and the result."

failed to prove on a balance of probabilities that Mokgethi was guilty of the offence of insubordination, and since it had also failed to prove that Mokgethi had 'deliberately insulted the Respondent', the charge of insolence would not warrant a dismissal.

[16] To the extent that there may have been uncertainty created by the fine line between offences related to insolence and insubordination, the matter received attention in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*², where Kathree-Setiloane AJA stated the following;

"[19] It is clear from this finding that the Labour Court failed to appreciate that the refusal to carry out an instruction is not the only basis upon which to found a charge of insubordination. The offence of insubordination in the workplace has, in this regard, been described by our courts as a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer's authority. Whereas in some cases defiance of an instruction may indicate a challenge to the authority of the employer, this is not so in every case. Insubordination may also be found to be present where disrespectful conduct poses a deliberate (wilful) and serious challenge to, or defiance of the employer's authority, even where there is no indication of the giving of an instruction or defiance of an instruction. It is, therefore, not essential for an instruction to be given or disobeyed to found a challenge to the employer's authority. (My emphasis)

² [2015] 5 BLLR 484 (LAC) ; (2015) 36 ILJ 1511 (LAC). See also *Sylvania Metals (Pty) Ltd v Mello N.O. and Others* (JA83/2015) [2016] ZALAC 52 (22 November 2016), where it was held that;

"[17] Insubordination in the workplace context generally refers to the disregard of an employer's authority or lawful and reasonable instructions. It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's lawful authority. It includes a wilful and serious refusal by an employee to adhere to a lawful and reasonable instruction of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given.

[18] This Court in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*, discussed the "*fine line*" between insubordination and insolence, with the latter being conduct that is offensive, disrespectful in speech or behaviour, impudent, cheeky, rude, insulting or contemptuous. While the Court noted that insolence may become insubordination where there is an outright challenge to the employer's authority, "*acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful*". The sanction of dismissal is reserved for instances of gross insolence and gross insubordination or the wilful flouting of the instructions of the employer". (footnotes and citations omitted)

[20] The refusal by an employee to carry out an employer's instruction is, therefore, not always required for a finding of insubordination. However, the failure of the Labour Court to recognise this did not, in my view, influence its characterisation of the conduct of the first respondent, on the evidence led at the arbitration hearing in relation to charge A, as constituting "insolence" as opposed to "insubordination". In characterising the first respondent's conduct as "insolence", the Labour Court relied upon the decision of *Wooltru*, which emphasises the importance of distinguishing insubordination from insolence simply because they are different offences. *Wooltru* equates the offence of insolence with conduct which is offensive, disrespectful, impudent, cheeky, rude (disrespectful in speech or behaviour), insulting or contemptuous, and insubordination with "resistance to or defiance of authority; disobedience, and refusal to obey an order of a superior". *Wooltru* makes it clear that although an employee can be both insolent and insubordinate at the same time, he or she can be insolent without necessarily being insubordinate. Notably, the Court in *Wooltru* held that a mere disrespect for the employer (or insolence, impudence, cheekiness or rudeness) cannot, on its own, constitute insubordination which by its very nature requires disobedience or an outright challenge to authority. Insubordination it observed:

"can manifest itself in the refusal to obey a reasonable and lawful command or in the challenge (or resistance) to or defiance of (see especially The Shorter Oxford Dictionary above) the authority of the employer. It is of course required that insubordination must be deliberate (wilful) and serious (above). This is not to say contemptuousness of authority (insolence, impudence, cheekiness, disrespect or rudeness) cannot constitute a ground of dismissal (provided, of course, that it is wilful and serious). One should, however, always distinguish between insubordination on the one hand and insolence on the other hand because they are definitely not the same kind of offence." (footnotes omitted)

And,

"[22] As demonstrated, there is a fine line between insubordination and insolence, and insolence may very well become insubordination where there is an outright challenge to the employer's authority. However acts of mere insolence and insubordination do not justify dismissal unless they are

serious and wilful. A failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful (deliberate) and serious. Likewise, insolent or disrespectful conduct towards an employer will only justify dismissal if it is wilful and serious. The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her. Thus, unless the insolence or insubordination is of a particularly gross nature, an employer must issue a prior warning before having recourse to the final act of dismissal.(footnotes omitted)

- [17] In this case, it was common cause that no particular instruction was issued or disobeyed in the strict sense of a typical insubordination scenario. Having made the distinction between the two offences, the Commissioner had concluded that the charge of insubordination was either misplaced or not proven, on the basis that there was no proof of an instruction having been issued. Clearly as stated in *Palluci*, that should not have been the end of the enquiry, in that the standing principle is that insubordination can be present even in the absence of a refusal to obey an instruction, where it is found that the disrespectful conduct complained of, posed a deliberate (wilful) and serious challenge to, or defiance of the employer's authority.
- [18] The Commissioner's approach should however be excused in that it could not have been expected of her to be mindful of the judgment in *Palluci*, since it was heard on 02 September 2014, and judgment delivered on 12 December 2014, whilst the matter before the Commissioner was heard on 20 June 2014. Be that as it may, the principle that the offence of insubordination encompasses conduct by the employee which poses a deliberate and serious challenge to the employer's authority is not novel³.
- [19] Even if the Commissioner can be criticised for treating the two offences as distinct in coming to her findings, the issue is whether that approach should

³ *CWIU and Another v S A Polymer Holdings (Pty) Ltd t/a Megapack* (1996) 8 BLLR 978 (LAC)

be sufficient to have the award set aside. It is trite that it is not sufficient for an award to be set aside simply to establish a gross irregularity in the conduct of the arbitration proceedings, as it is incumbent upon the applicant to also establish that the result was unreasonable.⁴

[20] In determining whether the outcome arrived at by the Commissioner was reasonable or not, the facts of the case before the Commissioner were that Mokgethi was issued with a warnings on 18 and 19 March 2014 in respect of work performance. On Hornsby's and Mokgethi's versions, the latter sought to have the warning for 18 March 2014 reviewed, or at least reduced from 12 months. That issue also arose within the context of allegations surrounding the performance of his duties. It is further not in dispute that upon being called to sign for the two warnings in Hornsby's office, Erwee and Mnyaka were present, and whilst Mokgethi was addressing himself to Hornsby, Erwee had intervened, resulting in Mokgethi saying to him words to the effect that; "*ek is nie jou speelgrond en jy is nie my bass*". What is in dispute is whether the words uttered were accompanied by foul language.

[21] The Commissioner was therefore required to consider the credibility of the various witnesses, the reliability of their observations and the inherent probabilities of their versions in determining whether Mokgethi had used foul language⁵. The Commissioner's findings in this regard are either not clear or

⁴ See *Belloord 28 CC v CCMA Johannesburg and Another (JR1499/17) [2018] ZALCJHB 112 (15 March 2018)* at para 8, where it was held that;

"The threshold for review is fairly well-established. Section 145 permits the review of an arbitration award, amongst other grounds, where the arbitrator commits a gross irregularity. This extends to latent gross irregularities or, put another way, instances where an arbitrator fails to apply him or herself to the available evidence, makes defect of factual findings and the like. In these instances, a party seeking to set aside an award or ruling must establish both the irregularity or defect relied on and that the *Sidumo* threshold is met. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2007] ZALC 66; [2014] 1 BLLR 20 (LAC), the Labour Appeal Court noted that it is not sufficient for an award to be set aside simply to establish a gross irregularity in the conduct of the arbitration proceedings; it is incumbent on an applicant to establish that the result was unreasonable or '*put another way, whether the decision that the arbitrator arrived at is one that falls outside the band of decisions to which a reasonable decision-maker could come on the available material*'. In other words, the review court must consider whether despite the arbitrator's reasoning, the result is nevertheless capable of justification on the available material. Thus, material errors of fact on the part of the arbitrator, as well as the weight and relevance to be attached to particular facts or a failure to have regard to particular facts are not in themselves sufficient grounds for review; their effect must be to render the outcome unreasonable."

⁵See *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* (2003) 1 SA (11) SCA at paragraph 5

confusing in that she merely concluded that it was not proven that Mokgethi had 'deliberately insulted the Respondent' for the purposes of the offence of insolence.

[22] Thus, to the extent that the Commissioner had found that there were 'insults', even if not 'deliberate', the conclusion to be reached is that she had accepted that Mokgethi had used the foul language in question. Even if I might be incorrect in my assessment, it is indeed improbable that three witnesses could corroborate each other's version in that regard, as opposed to Mokgethi's denials and conspiracy theory that there was a plan designed by Supreme to see him dismissed, as the company wanted Mnyaka to assume his position of supervisor. Mokgethi's theories as to why the allegations were made against him were far-fetched, more particularly in circumstances where he had conceded to having uttered other words attributed to him, except the foul language towards Erwee.

[23] Having made that conclusion, the next issue for determination would have been whether the insults/foul language constituted disrespectful conduct that posed a deliberate (wilful) and serious challenge to, or defiance of the employer's authority. It is appreciated that Mokgethi was clearly aggrieved after having been issued with warnings on two subsequent days. He may have been aggravated by the intervention of Erwee but even then, his conduct of addressing him in an aggressive expletive laden manner and tone was clearly disrespectful, and should be characterised as conduct posing a deliberate and serious challenge to the employer's (Erwee's) authority. The mere fact that Mokgethi deprecated Erwee's position as his superior by saying to him that he was not his '*fokken bass*' when the latter was merely intervening in a workplace issue between Mokgethi and Hornsby is sufficient to reach that conclusion.

[24] The next issue for determination is whether the conduct in question was gross enough to warrant a dismissal. It is trite that acts of insolence and insubordination do not in themselves justify a dismissal, unless they are gross, serious and wilful. The Commissioner had found that the foul language used by Mokgethi did not constitute insolence as the 'insults were not

deliberate', and thus did not warrant or justify a dismissal. In my view, if addressing a senior employer in an aggressive, offensive, disrespectful, impudent, cheeky, rude, contemptuous and foul mouthed manner is not insolence, coupled with a clear repudiation of his status in the organisation or challenge of his authority as in this case, I fail to appreciate what could possibly constitute conduct equivalent to insolence or insubordination within the principles established in *Palluci*.

- [25] The evidence of Erwee, Hornsby and Mnyaka was that Mokgethi was aggressive, had an attitude (whatever that means) and was disrespectful when addressing Erwee, and clearly the conclusion by the Commissioner that the offence in question did not amount to insolence or insubordination within the context of the principles set out in *Palluci* is unsustainable. The fact that it was a once off incident does not make Mokgethi's conduct less objectionable.
- [26] It had also been held in *Palluci* that provocation by an employer prior to the act of insubordination or insolence may be a mitigating factor when determining the seriousness of the offence and in such circumstances dismissal may be too harsh a sanction⁶. In this case however, despite conceding that there was an argument between him and Erwee and Hornsby, Mokgethi did not raise a defence of provocation. In any event, he had denied that they had used the foul language attributed to him, and it follows that a defence of provocation cannot be sustainable where there is a denial of a commission of an offence.
- [27] It is further trite that in determining the appropriateness of a sanction of a dismissal, all circumstances must be looked at, including but not limited to the employee's personal circumstances, length of service, and disciplinary record,

⁶ At para [33], where it was held that;

"Whether misconduct amounts to insubordination depends on a number of factors including the wilfulness of the employee's defiance, the reasonableness of the order that was defied and the actions of the employer prior to the purported act of insubordination. Provocation by an employer prior to the act of insubordination by an employee, is thus an important factor that must be considered in assessing its gravity. The same principle in my view would apply to the act of insolence or gross insolence. If the employee was provoked into insolence or insubordination, it may have a considerable mitigating effect on the seriousness of the offence and may render the dismissal inappropriate."

the nature of the misconduct, whether there was a show of remorse, and the effect of the misconduct on a sustained employment relationship.

- [28] The Commissioner had concluded that the dismissal was substantively unfair and/or too harsh a sanction. That conclusion came about in circumstances where Mokgethi had conceded that other than the warnings issued on 18 and 19 March 2014, he had previously been issued with other warnings related to his work performance (Written warnings dated 31 July 2012 and 8 March 2012), and also that he was previously promoted and demoted. The Commissioner had also concluded that there was no evidence suggesting that the continuation of the employment relationship was impossible. This conclusion nonetheless is a misapplication of legal principles subsequent to the decision in *Edcon Limited v Pillemer NO and others*⁷. The legal position now is that it must be implied from the gravity of the misconduct that the trust relationship had broken down⁸.
- [29] In these proceedings, it was submitted on behalf of Mokgethi that even if the conclusions of the Commissioner were susceptible to criticism, at most, the transgression in question called for a final written warning. The submission made on behalf of Supreme was that because of the abusive nature of the language used towards Erwee who was a superior, at most, and to the extent that it was found that a dismissal was not appropriate, the Court could order the re-employment of Mokgethi rather than retrospective reinstatement.
- [30] I have had regard to the circumstances of this case and it is apparent that the nature of the foul language used by Mokgethi towards Erwee, constituted of conduct that posed a challenge to his authority. It is accepted that Mokgethi had long service with Supreme, and I agree with the submissions made on behalf of Supreme in these proceedings that even if the sanction of dismissal was deemed to have been harsh, at most, a re-employment would have sufficed. The inference to be drawn from this submission is that the Commissioner's conclusion that the sanction may have been too harsh is validated. I further agree with that submission, particularly when it is taken

⁷ [2010] 1 BLLR 1 (SCA).

⁸ *Impala Platinum Ltd v Jansen* [2017] 4 BLLR 325; (2017) ILJ 896 (LAC)

into account that despite the conduct in question, it was indeed nonetheless precipitated by Mokgethi being aggrieved of the fact that he was issued with warnings (a 12 month warning and a subsequent final written warning) on two successive days, and in circumstances where those warnings were issued without a benefit of a hearing, and worst still, where he was simply expected to sign acknowledgement of their receipt without questioning them. I am mindful of the fact that these factors were not issues raised by Mokgethi or on his behalf before the Commissioner or in these proceedings. Be that as it may, this being a Court of equity, it would be iniquitous for it to completely ignore those factors. This is particularly so since it was common cause that Mokgethi represented himself in both the internal disciplinary hearing and the arbitration proceedings.

- [31] Furthermore, given the context within which the disrespectful conduct took place, it is doubted whether it can be classified as serious defiance of the employer's authority within the context of a strict application of the charge of insubordination. Consequently, some severe sanction was appropriate, but not a dismissal. For the Commissioner to therefore have reinstated him with full retrospective effect and backpay, that is not a decision that a reasonable decision maker would have made. In the circumstances, I am persuaded by Supreme's alternative submissions in regards to sanction, and the acknowledgements made on behalf of Mokgethi that he was deserving of some sanction.
- [32] In regards to procedural fairness, the Commissioner had concluded that Mokgethi's dismissal was procedurally unfair in that in terms of the notice of a disciplinary enquiry issued on 19 March 2014, the enquiry was to be held on 31 March 2014 and subsequently rescheduled for 3 April 2014. The chairperson's refusal to address Mokgethi's complaints that his representative was not available was unfair, and that Supreme acted hastily in refusing a postponement, as it would not have suffered any prejudice.
- [33] Supreme attacked the Commissioner's conclusions on the basis that she failed to take into account that Mokgethi had not sought a postponement of the hearing, as supported by a checklist, which Mokgethi had acknowledged

and signed, and which further indicated that his rights were explained to him by the chairperson. Mokgethi's evidence was however that having been notified that the hearing would be held on 31 March 2014, he had attended on that date accompanied by his representative. The hearing did not proceed as the chairperson was not available and he was informed to come back on 3 April 2014 for the hearing. On the latter date he did not have his representative with him and he was told that he had sufficient time to arrange for one. He testified that the hearing had proceeded in his absence.

[34] Under cross-examination, it was put to him that he might have confused the events of 3 April 2014 with those of another instance previously where he was called to attend another hearing, to which he had conceded that he might have been confused. Upon being referred to a checklist completed at the hearing, where it was indicated that he had agreed to proceed despite the absence of his representative and to which he had attached his signature, his response was that he had nonetheless made a request for a postponement, but that the chairperson told him that he was proceeding with the matter, hence he had signed the checklist. Upon it being put to him that he had in any case three days within which to arrange for a representative, his response was that he did, but on the date of the hearing.

[35] The Commissioner in making her findings had concluded that based on the copy of the notice to attend the internal enquiry, that enquiry was initially scheduled for 31 March 2014, and the date was subsequently changed to 3 April 2014. During the arbitration, there was a submission from the bar by Supremes' representative (Mr HH Spamer, its HR Manager), to the effect that there were logistical problems related to arrangements of disciplinary hearings, a change of dates where necessary, and what employees ought to do when they sought a postponement where dates had been changed⁹. This however did not amount to evidence, and it was common cause that the chairperson of the enquiry was not called upon to testify. In my view, the Commissioner's conclusions that there was a request for a postponement which was declined cannot be faulted, irrespective of attempts by Spamer at

⁹ Page 51 of the record of proceedings at lines 7 - 15

the arbitration proceedings to portray that Mokgethi might have confused the latest disciplinary enquiry with another one previously held.

[36] A fundamental principle of a fair procedure prior to dismissing an employee is to afford him an opportunity of representation. In this case, Mokgethi had on 31 March 2014, brought a representative with him hoping that the enquiry would be held. Supreme's reliance on the fact that Mokgethi had signed the disciplinary enquiry checklist to indicate a waiver of his rights to representation is not sufficient in the absence of confirmation from the chairperson of that enquiry, and in my view, the conclusion reached by the Commissioner that the chairperson acted hastily in proceedings with the matter in the absence of Mokgethi's representative when Supreme would have suffered no prejudice by postponing the proceedings cannot be faulted.

[37] In the light of the conclusions reached in regards to the procedural and substantive fairness of the dismissal, and further having had regard to the material before the court, it follows that no purpose would be served by remitting this matter back to the CCMA. Further having had regard to the requirements of law and fairness, it is my view that a cost order is not warranted in this case. Accordingly, the following order is made;

Order:

1. The arbitration award dated 20 June 2014 issued by the second respondent is reviewed and substituted with an order that;
 - i. The dismissal of Mr Lebogang Petrus Mokgethi was substantively and procedurally unfair.
 - ii. Supreme Poultry (Pty) Ltd is ordered to retrospectively reinstate Mr Mokgethi in its employ, on terms and conditions of employment as applicable to his employ as at 3 April 2014.
 - iii. Notwithstanding the retrospective reinstatement, Mr Mokgethi, shall not be entitled to any back-payment.
2. There is no order as to costs.

E Tlhotlhemaje
Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicant:

L Pillay

Instructed by:

Yusuf Nagdee Attorney

For the 3rd Respondent:

Ludwig Frahm-Arp of Fasken Martineau

(Pro Bono)

LABOUR COURT