IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1054/16

In the matter between:

SAMWU OBO ON MOSOMA **Applicant**

and

NM LEDWABA *N.O* **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL (SALGBC) **Second Respondent**

GREATER TUBATSE LOCAL MUNICIPALITY **Third Respondent**

Heard: **21 February 2019**

Delivered: **28 February 2019**

JUDGMENT

MAHOSI. J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act (LRA)[1] to set aside the arbitration award (award) issued by the first respondent (the commissioner) under case number LPD111416 dated 2 May 2016. The

[1] Act 66 of 1995 as amended.

commissioner found that the dismissal of the applicant's member (the employee) was substantively fair but procedurally unfair and ordered the third respondent (the Municipality) to pay him compensation in the amount equivalent to four months remuneration.

[2] Before this Court is also an application for condonation of the late filing of the complete record. The Municipality consented and I am satisfied that the applicant's explanation discloses a good and justifiable reason for filing outside the prescribed time limit.

[3] The remaining issue is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.

[4] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.

Brief background facts

[5] The employee started working for the Municipality in 2005 as an Assistant Manager: Supply Chain. At the time of his dismissal, he had been promoted to the position of Manager: Supply Chain and was also the secretary on the Bid Adjudication Committee (BAC).

[6] During 2011, the Municipality had entered into an agreement with the Department of Energy for the electrification of nine regions within its jurisdiction. In order to give effect to the agreement, the Municipality invited bids from service providers. The bids were received and evaluated by the Bid Evaluation Committee (BEC) and subsequently forwarded to the BAC. Out of all the bids submitted, only one of the service providers was recommended to the Municipal Manager for appointment. The Municipal Manager referred the matter back to the BAC, which subsequently recommended that he explore the provisions of the Supply Chain Management Policy to effect the appointment of the required service providers.

[7] These provisions included section 36 of the Second Amended Supply Chain Management Policy that allowed the Municipal Manager to appoint a service provider without following the prescribed competitive bidding process in cases where the urgency of the matter justifies this, or in exceptional circumstances where it was impractical or impossible to follow the official procurement process.

[8] It was on the strength of the BAC's recommendation and advice that the then Municipal Manager, Mr Phala, appointed the service providers in terms of section 36 of the Second Amended Supply Chain Management Policy. This was done in terms of the resolution taken by the Council, after having noted the urgency of the project.

[9] On 30 April 2013, the Council took a resolution to appoint forensic investigators for the purpose of investigating irregularities in the appointment of the service providers. Flowing from the investigation, the employee was suspended with effect from 09 July 2013. Subsequently, disciplinary proceedings against the employee were initiated. The employee challenged some aspects of the disciplinary process in this Court successfully.

[10] As a result, the employee was issued with a new charge sheet on 08 November 2013. On 25 November 2015, after the disciplinary hearing was postponed several times, the Municipality issued the employee with a letter of dismissal. Aggrieved by the Municipality's decision to dismiss him, the employee referred the dismissal dispute to the second respondent.

[11] The dispute was conciliated unsuccessfully, after which it was certified as unresolved. The employee then referred the dispute to arbitration at the end of which the commissioner found that the employee's dismissal was substantively fair but procedurally unfair. It is this award that is the subject of this application. The grounds on which the applicant seeks to have the award reviewed and set aside are considered herein below.

Grounds for review

[12] Although the applicant raised a number of grounds for review, the issues were mainly firstly whether the commissioner determined the substantive fairness of the employee's dismissal. Secondly, whether the commissioner evaluated the facts presented before him.

The test for review

[13] The test for review has become trite law. The test is whether the decision reached by the commissioner is one that a reasonable commissioner could have reached. The decision must fall within a radius of reasonableness.

[14] In *Head of the Department of Education v Mofokeng and Others*[2] the Labour Appeal Court (LAC) confirmed the *Herholdt v Nedbank Ltd*[3] and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[4] judgments and held as follows:

> 'The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.'[5]

[15] The LAC further held as follows:

> '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

[2] [2015] 1 BLLR 50 (LAC).
[3] [2013] 11 BLLR 1074 (SCA).
[4] [2014] 1 BLLR 20 (LAC)
[5] At para 30.

irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'[6] [Footnotes omitted]

Analysis

[16] In support of it's contention that the commissioner failed to determine the substantive fairness of the employee's dismissal, the applicant referred the Court to the part of the award where the commissioner stated as follows:

> 'The dismissal of Mr ON Mosoma as pronounced/confirmed by the Municipal Manager on 25 November 2014 is upheld and remains appropriate.'

[17] In this regard, the applicant's contention was that the commissioner acted *ultra vires* in confirming an unlawful dismissal by the former acting Municipal Manager. This challenge to the commissioner's award is baseless and unwarranted. The reading of the award reveals that the commissioner was

[6] At para 33.

aware of the issues before him. At paragraph 4 of his award, the commissioner clearly states that the issue to be decided is whether the Municipality dismissed the employee for a fair reason and in accordance with a fair procedure. He further stated that if he finds the employee's dismissal to be fair, the LRA enjoined him to determine the appropriate relief.

[18] The commissioner did not stop there, he outlined the survey of evidence and arguments raised at the arbitration proceedings. The evidence related to both substantive and procedural fairness of the employee's dismissal. In his analysis of the evidence and arguments, his point of departure was that to an extent that the dismissal was not in dispute, the burden of proof rested on the Municipality to prove the misconduct that constituted the reason for the employee's dismissal.

[19] Prior to analysing the evidence and argument before him, he summarised the charges levelled against the employee. These included gross dereliction of duties, the contravention of the supply chain management policy, a contravention of paragraph 8 of his employment contract, the prejudices caused by his conduct to the Municipality, that he abused the power and procurement policies, regulations and/or legislation, that he lacked proper management of the assets, dereliction of duties and poor performance.

[20] The dispute between the parties revolved around the appointment of the unqualified service providers and the payment of their service. The applicant's case at the arbitration and in these proceedings was that the employee was not responsible for the appointment of the service providers, that the decision to appoint them was taken by the Municipal Manager after approval of the Council, that he had no influence over the Municipal Manager's decision and that when he paid the service providers, he acted on the instruction of the Municipality.

[21] In supporting its contention, the applicant referred this Court to the judgment of *Manana v King Sabata Dalindyebo Municipality.*[7] In this matter, the Municipality adopted a resolution to appoint Mr Manana in a position of Manager Legal Services and to pay him back pay. Mr Manana was notified of the resolution through a letter which he signed in acknowledgement of his acceptance of appointment. Despite the resolution and the acceptance of his appointment, Mr Manana's salary was not adjusted. To justify its failure to adhere to the resolution, the Municipality made two submissions to the Court. Firstly, that the resolution was not relevant because the power to appoint vested in the Municipal Manager. Secondly, that the resolution was invalid. On the first submission, the Court held as follows:

> '[17] In my view s 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers. Indeed, as I have already pointed out, the Constitution vests all executive authority – which includes the authority to appoint staff – in the municipal council and legislation is not capable of lawfully divesting it of that power. To the extent that there might be any ambiguity in the statute in that respect it must be construed to avoid that result.'

[22] On the validity of the resolution, the Court held as follows:

> '[21] No authority was advanced for the submission that a duly adopted resolution of a local authority might be ignored by its officials if they have a belief that it is invalid, even if that belief is well-founded. Indeed, the contrary was held in the early case of *Grace v McCulloch.* In that case a resolution was adopted by a municipal council in contravention of its standing orders. After it was adopted the chairman of the council ruled the resolution to be out of order and instructed the town clerk not to act on it. Upholding a claim by members of the council to set aside that ruling and instruction Curlewis J said the following:

[7] [2011] 3 BLLR 215 (SCA); (2011) 32 ILJ 581 (SCA); [2011] 3 All SA 140 (SCA) (*Manana).*

> "When once the council has taken a resolution it is not competent for the chairman, any more than for any other councillor, to declare it invalid and of no effect; nor is it competent for him to take upon himself the responsibility of instructing the town clerk not to act on a resolution passed by a majority of the council. If the chairman or any councillor is dissatisfied with a resolution, his course is to give notice of motion to rescind or reconsider the resolution as provided by the standing orders. That is one course. If the resolution is clearly wrong or illegal another course is to come to Court, and ask to have such resolution declared illegal. But I do not think the power to declare resolutions invalid lies with the chairman."

> [22] Although that case was decided a considerable time ago we were referred to no subsequent authority that conflicts with it and I know of none. Although this case must be decided under a different constitutional dispensation I can see no new principle that drives one in another direction. On the contrary, it seems to me that it would be conducive to disorderly public administration if officials were entitled to choose between executing or not executing a duly adopted resolution of the council depending upon their belief as to its validity – whether or not the belief is well-founded. In the absence of authority to that effect, or a principled explanation for why that should be so, neither of which is before us, I think the submission must be rejected. A municipal council acts through its resolutions. No doubt a municipal council is entitled to rescind or alter its resolutions. And no doubt an interested party is entitled to challenge its validity on review. But once a resolution is adopted in my view its officials are bound to execute it, whatever view they might have on the merit of the resolution, in law or otherwise, until such time as it is either rescinded or set aside on review.'

[23] The current matter is clearly distinguishable from *Manana*. The Municipality was faced with the irregularly appointed service providers which may have resulted from the conceivably corrupt conduct of its own employees as opposed to the validity of a contract or its resolution. It is a trite principle in our law that an employer has a right or prerogative to discipline an employee. In this matter the

Municipality is and remains the employer of the employee, who is responsible for public funds. Although the Council took a resolution to appoint the service providers in question, it later adopted another resolution to investigate the circumstances that led to the adoption of its own resolution. Based on the outcome of the audit investigation, the same Council resolved to suspend and charge the employee.

[24] It is apparent from the reading of the award and the record that the commissioner considered the evidence before him. It was common cause that out of nine service providers, the BAC recommended only one service provider after having met on 18, 22 and 26 July 2011. Despite its recommendation, the Municipal Manager proceeded to appoint other unqualified service providers within 48 hours of the BAC's decision. In addition, it was only on 21 October 2011 that the Municipal Manager signed the decision to appoint them in terms of section 36.

[25] The employee contended that as secretary of the BAC, he merely transcribed the proceedings and outcome of the meeting that resulted in the recommendation to deviate from policy. Mr Phasha who testified in support of the Municipality's case stated that the employee, being the custodian of the policies, had the responsibility to advise the Municipal Manager. His evidence was corroborated by both Mr Morathi and Ms Monyepao who added that the employee was responsible to advise the Municipal Manager through the office of the CFO. It was on the strength of the above evidence that the commissioner found that it was highly probable that the employee misled the Municipal Manager in the appointment of the service providers and that his actions were sordid and deplorable.

[26] The employee confirmed that the responsibility of asset management fell within his department. To an extent that the employee refused to respond to a question on whether he managed his department efficiently, the commissioner drew a negative inference. He further did not dispute that he signed the internal

purchase requisition to facilitate the payment of the service providers in question and testified that payment would not have been effected without his signature. His justification was that he could have been charged with insubordination had he refused to do so. The commissioner rejected this justification on the basis that, in his position, the employee knew or ought to have known that he approved payment for unqualified service providers. Consequently, the commissioner was convinced that the Municipality proved that it suffered unauthorised, irregular and wasteful expenditure in favour of the unqualified service providers.

[27] It was on the basis of the above evidence that the commissioner found that the Municipality discharged the onus of proving that the employee breached the applicable rules as contained in the SCM policy and the PFMA which rules he was repeatedly trained on at the Municipality's expense.

[28] Having made his finding on the existence of the rule and the knowledge thereof, the commissioner considered the evidence relating to the procedural fairness. He found that, contrary to the Collective Agreement and the LRA, the Municipality failed to accord the employee an opportunity to state his case in a fully constituted disciplinary hearing. On this basis, he concluded that his dismissal was procedurally unfair.

[29] The commissioner further considered the appropriateness of the sanction of dismissal. Item 3 of the Code of Good Practice: Dismissal provides guidance on how the employers should deal with the determination of sanction and it provides as follows:

> '3. Disciplinary measures short of dismissal.
>
> Disciplinary procedures prior to dismissal.
>
> (1) All employers should adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of

the employer's business. In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules of standards may be so well established and known that it is not necessary to communicate them.

(2) The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.

(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances, the nature of the job and the circumstances of the infringement itself.

(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

[30] Thus, in determining the appropriateness of the sanction, the commissioner must enquire into the gravity of the contravention of the disciplinary rule; the consistent application of the disciplinary rule and sanction; and the mitigating and aggravating factors. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[8] the Constitutional Court held that:

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

[31] It is trite that in determining whether the sanction imposed by the employer is fair, the commissioner is required to take into account the totality of circumstances. [9] In this case, the commissioner took into account the seriousness of the misconduct the employee was charged with and the importance thereof. The commissioner further took into consideration the

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[8] [2007] 12 BLLR 1097 (CC) at para 78.
[9] *Sidumo* at para 78.

evidence led in relation to the allegation of lack of consistency in the application of the rule and found that the applicant could not substantiate its claim.

[32] In the circumstances of this case, taking into account the employee's position, the serious nature of the allegations against him, the public interest in ensuring that allegations of corruption and mismanagement at the highest levels of the public service are acted against swiftly and efficiently, I am satisfied with the commissioner's conclusion that the employee's dismissal was substantively fair.

[33] It is my view that the commissioner was reasonable in his assessment of the evidence before him. He reached a conclusion that any reasonable decision-maker would have reached on the issue of the probabilities of the versions placed before him. The manner in which he analysed the evidence and the arguments does not support the applicant's version that he misconstrued the enquiry he had to conduct or that he ignored materially relevant facts. The applicant further failed to establish that the arbitrator conducted the enquiry incorrectly because, as the award reflects, he dealt with the issue before him correctly and he considered all the evidence that was placed before him. What the applicant seeks to do in this application is to bring an appeal against the decision of the commissioner in a guise of a review.

[34] The applicant has not established any basis upon which the Court could find that the commissioner's award was reviewable. As such, it failed to discharge the *onus* of establishing that the commissioner either committed misconduct in relation to his duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings, or that he exceeded his powers. There is, therefore, no reason for this Court to interfere with his award.

<u>Costs</u>

[35] In terms of section 162 of the LRA, the Court has wide discretion in awarding costs. The Constitutional Court has recently reiterated in *Zungu v Premier of the*

Province of Kwa-Zulu Natal and Others,[10] that costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

[36] In the circumstances, I make the following order.

Order

1. The review application is dismissed.

2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Advocate Baloyi
	Instructed by Maenetja Attorneys
For the respondents:	Mr Shongwe of Shongwe Attorneys

[10] (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC) at para 24.