



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA141/2022

In the matter between:

GAUTENG DEPARTMENT OF EDUCATION

Appellant

and

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

First Respondent

MATOME SEHUNANE N.O.

Second Respondent

LINDIWE MALUKA

Third Respondent

JABULILE TSHABALALA
Respondent

Fourth

SAMKELISIWE TRACY NTOMBELA

Fifth Respondent

THEBEYAPELO MOSES SIBI

Sixth Respondent

Heard: 7 November 2024

Delivered: 22 January 2025

Coram: Savage ADJP, Nkutha-Nkontwana JA et Govindjee AJA

JUDGMENT

SAVAGE, ADJPIntroduction

- [1] This appeal, with the leave of the Labour Court, is against the judgment and orders of that Court which dismissed with costs the appellant's application to review and set aside the award of the second respondent arbitrator. At arbitration, the dismissals of the third to sixth respondents were found to have been substantively unfair and they were retrospectively reinstated into their employment with the appellant, the Gauteng Department of Education.
- [2] At the outset of the hearing, the appellant sought that the appeal be reinstated and that the late filing of both the notice of appeal and the appeal record be condoned. The respondent employees did not oppose the application to condone the late filing of the notice of appeal but opposed the application to reinstate the appeal and condone the extensive 11-month delay in filing the appeal record. Responsibility for the extensive delay in filing the appeal record lies squarely with the appellant's attorney, the State Attorney, whose explanation before this Court paints a bleak picture of a lack of organisation, lack of professionalism and apparent staff constraints at that office. The State Attorney is a state-funded functionary required to perform the important task of representing the interests of government departments and entities in various legal matters. It is in the public interest that it performs its task with the diligence and professionalism required of it. Its excuses for its lack of both, as evident in this matter, demand urgent action.
- [3] It is trite that the factors that a court will consider in deciding whether the grant of condonation is in the interests of justice include the nature of the relief sought; the extent and cause of the delay; the reasonableness of the explanation for the delay; the effect of the delay on the administration of justice and other litigants; the importance of the issue to be raised in the intended appeal; and the prospects of success. Determining what is in the interests of justice must reflect due regard to all relevant factors, with the particular circumstances of each case to determine the relevance of particular

factors.¹ Despite the State Attorney's dilatory conduct being the cause of the extensive delay in filing the record in this matter, having regard to factors including the prospects of success and issues of prejudice, it is in the interest of justice that the appeal be reinstated and the late filing of the record condoned.

Background

- [4] The respondents were charged with misconduct which was said to have taken place whilst at their workstations over a period of almost two years from 1 January 2014 to 30 November 2015 and related to the appointment and payment of ghost employees. The complaint was that the respondents had been involved in the appointment and salary adjustment of two ghost employees, S. Mabena and L. Mataba, as educators at Isiqalo Primary School, despite knowing that this was wrong. In addition, the fourth respondent was alleged to have been involved in the extension of the contracts of the same ghost employees and the fifth respondent was alleged to have been involved in the appointment of a further two other ghost employees, S. Kekana and Z. Mabeyo, at both Isiqalo and Munsieville Primary Schools.
- [5] Following a disciplinary hearing, the respondents were found to have committed the misconduct alleged and were dismissed from their employment with the appellant from 12 June 2017 to 16 October 2017. Dissatisfied with their dismissals, the respondents referred an unfair dismissal dispute to the first respondent, the General Public Service Sectoral Bargaining Council, challenging only the substantive fairness of their dismissals.
- [6] The persal system is the payroll and human resource system used by all government departments, including the appellant. The evidence at arbitration was that in April 2013, the Gauteng Provincial Governments' User ID and Password Policy was approved which required that user staff identities and passwords on the persal system remain private and not be shared. Clause

¹ See: *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) at para 22.

13.7 provided that “(r)egardless of the circumstances, passwords should never be shared or revealed to anyone else by the authorised user”. Clause 13.8 recorded that employees as users “(a)re responsible for all activity performed with their personal-User IDs” and “(s)hould not allow the User-ID to be used by anyone else” and should “not perform any activity with [any] other User-ID”. There was no dispute at arbitration that the respondents’ persal credentials, being their usernames and passwords, were used over a period of two years to defraud the appellant of approximately R2 million through the appointment and payment of ghost employees. The monies defrauded were paid in respect of these ghost employees into bank accounts belonging to Mr Kenneth Mothlang, who was employed by the appellant as principal personnel officer and reported to the fifth respondent. The respondents contended that it was Mr Mothlang who had committed the fraud, for which he was criminally charged and convicted, and that they were not aware how he had obtained their passwords which were repeatedly changed over the two-year period.

[7] The arbitrator found that the respondents were not charged “*in relation to the condition of their persal credentials*” but with “*actual theft*”, which was not proved; and that although the misconduct was said to have occurred at their workstations in Krugersdorp, it had been committed in Braamfontein, Johannesburg and Pretoria. Although the arbitrator accepted that the third respondent had signed staff appointment forms brought to her for processing by Mr Mothlang, she was found not to have been involved in replacing the completed forms with incomplete forms to defraud the appellant.

[8] The arbitrator concluded that the appellant’s case was “*highly improbable and not convincing at all*” and had been based on a presumption, which was successfully rebutted, that if an employee’s credentials were used they could be presumed to have committed the fraud. The evidence was found not to support a finding of fraud and the dismissal of the respondents was found to be substantively unfair. The respondents were consequently reinstated retrospectively into their employment with the appellant with backpay.

Judgment of the Labour Court

[9] Aggrieved with the outcome at arbitration, the appellant sought the review of the arbitration award by the Labour Court. That application was dismissed on the basis that the appellant's version was not probable, with the arbitrator found to have applied his mind to the facts, which did not prove that the respondents were aware of, or had participated in, the fraud. The Court noted that although the respondents' credentials were used to defraud the appellant, no other evidence linked them to the commission of the offences. The respondents were not charged with sharing their persal credentials, there was no evidence that they had done so, and they did not know how Mr Mothlang had obtained their credentials. In addition, they were found not to have been aware of the 2013 policy relating to the safekeeping of their persal credentials, with the pop-up screen reminding employees to hide their credentials only having been introduced in 2016. The Court took account of the fact that it was the respondents who had conducted the initial investigation which led to Mr Mothlang's resignation and later criminal conviction and that the appellant had not opened a criminal case against the respondents. In addition, the third respondent denied having signed an incomplete HR7 form and her evidence was that attachments to the form were replaced by the person who had the intention to defraud their appellant.

[10] The Court therefore concluded that the arbitrator had reasonably found that the respondents could not have been found guilty of the allegations against them. Costs were awarded against the appellant by the Court to express its displeasure at the conduct of the appellant on the basis that the respondents had been "*compelled to defend a hopeless review application*" despite the reasonableness of the award.

On appeal

[11] The appellant contended on appeal that the Labour Court had erred in failing to have regard to the fact that the issue before the arbitrator was whether the respondents had participated in the appointment and payment of ghost employees when the evidence showed that their persal credentials had been used over a two-year period, despite each respondent changing their passwords monthly. From 2013, the respondents would have been aware of

the relevant policy and the rule that they safeguard their passwords. The fact that the payments had been made away from the respondents' workplace did not prevent their persal credentials from being used and the evidence supported a finding that the respondents had shared their persal credentials with Mr Mothlang. Furthermore, the evidence showed that the third respondent had signed an incomplete appointment form in respect of a ghost employee which linked her to the misconduct. The fact that Mr Mothlang was convicted and sentenced for his involvement in the matter did not exonerate the respondents of wrongdoing. The award of the arbitrator was contended to be one that a reasonable arbitrator could not make and, it was submitted that the Labour Court erred in finding differently and in its order of costs made against the appellant.

- [12] The respondents opposed the appeal. They accepted that their passwords, which on the undisputed evidence were regularly changed, had over an extended period of time been used by Mr Mothlang but that there was no proof that they had committed the misconduct alleged. The appellant failed to prove how Mr Mothlang obtained their passwords, with the evidence being that the offences occurred at different locations away from their workstations in Krugersdorp. Furthermore, it was contended that it was only in 2016 that the policy was implemented which reminded employees via a pop-up screen to keep their persal credentials confidential. For these reasons, the respondents sought that the appeal be dismissed with costs.

Evaluation

- [13] An employer is required to notify the employee of allegations of misconduct raised against the employee in sufficient detail and in a form and language that the employee can reasonably understand in order to allow the employee to answer to such allegations.² It is not required, as was suggested in *Murray and Roberts Cementation (Pty) Ltd v Association of Mineworkers and Construction Union on behalf of Dube and Others*,³ that "when formulating charge sheets, employers must advise the accused employee of the precise

² Item 4(1) of Schedule 8 to the Labour Relations Act 66 of 1995, as amended.

³ [2023] ZALAC 26; (2024) 45 ILJ 276 (LAC).

charge he or she is required to answer in the disciplinary hearing".⁴ This Court has made it clear that disciplinary proceedings are not criminal trials, nor are they intended or required to resemble highly technical civil trials. Employers in disciplinary proceedings may not be lawyers and may at times define the nature of the alleged misconduct raised against an employee imprecisely, too narrowly or even erroneously record the legal basis for such misconduct, for example as fraud when the legal requirements of theft may in fact be met. As has repeatedly been emphasised by this Court, it is not necessary that the employee be given notice of the precise legal basis for a complaint of misconduct in a highly technical charge sheet. Rather the employee must be informed in the appropriate manner of the allegation of misconduct raised in sufficient detail to enable the employee to understand such complaint and answer to it.⁵

[14] The respondents were charged by the appellant with having been involved in the appointment and payment of ghost employees over a period of almost two years. The undisputed evidence before the arbitrator was that Mr Mothlang had obtained the respondents' persal credentials, including their passwords, which he used to effect the fraudulent transactions. Importantly, what the evidence showed was that Mr Mothlang had repeatedly obtained the respondents' passwords, which the respondents updated monthly, over an extended period of time. The evidence of the third respondent that the employees changed their passwords on the persal system on a monthly basis was not disputed by any of the other respondents. Yet, none of the respondents were able to explain how Mr Mothlang could repeatedly have obtained their updated passwords. In addition, the undisputed evidence was that the third respondent had appended her signature to the form appointing a ghost employee which had been brought to her for processing by Mr Mothlang.

[15] The arbitrator took an unduly narrow and technical approach to the charge sheet, finding that the respondents "*were never charged in relation to the*

⁴ Id at para 19.

⁵ See: *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2019] ZALAC 57; (2019) 40 ILJ 2477 (LAC) at para 16.

condition of their persal credentials but were charged for actual theft". This in circumstances in which it was apparent that the disciplinary complaint against the respondents was that they had been involved in the fraudulent appointment and payment of ghost employees. The issue for determination by the arbitrator was whether it had been proved that the respondents had been involved in the commission of such misconduct and whether their dismissals were fair. In considering as much the arbitrator found that the appellant's case was "*highly improbable and not convincing at all*" on the basis that even if the respondents' credentials were used, this did not prove that they had committed the fraud.

[16] It is trite that a party alleging a defect in arbitration proceedings may seek the review of an award on the grounds set out in s 145(2) of the Labour Relations Act⁶ (LRA), namely misconduct committed in relation to the duties of the arbitrator; a gross irregularity in the conduct of the arbitration proceedings; the exceeding of powers; or improperly obtaining an award. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁷ these grounds were found to be suffused by the standard of reasonableness, with it for the review court to determine whether the decision reached by the arbitrator was one that a reasonable decision-maker could not reach.⁸

[17] In *Herholdt v Nedbank (Congress of SA Trade Unions as Amicus Curiae)*⁹, it was stated that:

'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by Section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry 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, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are

⁶ Act 66 of 1995, as amended.

⁷ [2007] ZACC 22; 2008 (2) SA 24 (CC) at paras 105 and 110.

⁸ Ibid at para 110.

⁹ [2013] ZASCA 97; 2013 (6) SA 224 (SCA) (*Herholdt*).

only of any consequence if their effect is to render the outcome unreasonable.¹⁰

[18] This Court in *Head of Department of Education v Mofokeng and Others*¹¹, noted that a material error or irregularity may have a “distorting effect” on the decision arrived at such as that it may lead to an unreasonable result, in the sense that but for an error or irregularity, a different outcome would have resulted.¹² Errors of fact or law may therefore not be enough to vitiate an award unless it is established that the arbitrator undertook the wrong enquiry, in the wrong manner or arrived at an unreasonable result.¹³

[19] In this matter, the arbitrator failed to have regard to all of the evidence before him, including that which was not disputed, and carefully weigh it up in the required manner. It was a relevant consideration which required the careful attention of the arbitrator that the respondents failed to tender any explanation as to how Mr Mothlang could have repeatedly obtained their updated passwords over a period of almost two years. Their failure to proffer any such explanation was glaring, more so given the undisputed evidence that they had repeatedly and regularly reset their own passwords. The appellant’s 2013 policy expressly required that passwords should not be shared, with the user employee responsible for all activity performed using their persal credentials. It was reasonable to assume that, given the positions in which they were employed, the respondents were aware of, or ought reasonably to have been aware, of the rule set out in this policy; and that they would have known, or ought reasonably to have known, that the purpose of a password is to protect important information and to safeguard their own user and password credentials. Without any proper explanation provided by the respondents, an assessment of the probabilities supported a conclusion that Mr Mothlang would not, without the involvement of the respondents, have obtained their updated passwords repeatedly every month over a period of two years in order to then commit the fraud.

¹⁰ Ibid at para 25.

¹¹ [2014] ZALAC 50; (2015) 36 ILJ 2802 (LAC).

¹² Ibid at para 33.

¹³ *Herholdt supra* at paras 21 - 25.

- [20] The fact that the misconduct was detailed in the charge sheet as having occurred at the respondents' workstations when the evidence was that the payments were not made from their workstations is of no moment. This is so since it is patently clear that an employee's personal credentials could be used at any location. The finding of the arbitrator, supported by the Labour Court, that the employees had a valid alibi in that they are based in Krugersdorp and that the appellant did not produce evidence that placed them at the offices on the days that acts were committed was consequently without foundation and unsupported by the facts. Furthermore, the steps taken by the respondents apparently to investigate the fraud committed did not alter the fact that on a proper consideration of the evidence before the arbitrator, the probabilities supported a finding that the respondents had been involved in the commission of the misconduct of which they were charged.
- [21] In his approach to the arbitration it is apparent that the arbitrator committed a material misdirection in preferring certain aspects of the evidence over others, without having regard to whether such evidence was plausible or tenable and in the absence of a proper assessment of the probabilities. This had a clear distorting effect on the outcome at arbitration. It prevented a fair and proper determination of the issues from taking place and it caused the arbitrator to reach a conclusion which was one that a reasonable arbitrator on the material before them could not reach. It followed for these reasons that the award of the arbitrator fell to be set aside on review.
- [22] In its approach to the review application, the Labour Court erred in its conclusion that the award of the arbitrator was reasonable. This when it was apparent that the arbitrator's failure to undertake a proper and careful analysis of the evidence had had a distorting effect on the outcome at arbitration. Despite its conclusion that the award was reasonable, the Court engaged in a process more akin to an appeal than a review, finding that on the evidence the respondents could not have been found guilty of the allegations against them when they had not been shown to have been aware of the user 2013 policy. The Court disregarded the fact that, on their own version, the respondents had not disputed that they updated their passwords regularly and

had not denied that passwords should be safeguarded to protect the integrity and confidentiality of the system and prevent misuse. Since the conspectus of evidence was not properly considered in the manner required, the decision of the arbitrator fell outside of the ambit of reasonableness required and the award therefore ought properly to be set aside on review. In finding differently the Labour Court erred.

[23] For these reasons, the appeal must be upheld. The orders of the Labour Court consequently fall to be set aside and the decision of the arbitrator set aside and substituted with a finding that the dismissals of the respondents were substantively fair. Having regard to considerations of law and fairness, there is no reason why an order of costs should be made in this matter.

The following order is therefore made:

Order

1. The appeal is reinstated and the late filing of the notice of appeal and record of appeal are condoned.
2. The appeal is upheld with no order of costs.
3. The orders of the Labour Court are set aside and substituted as follows:
 - ‘1. The review application succeeds.
 2. The award of the arbitrator is set aside with the dismissal of the respondent employees found to be procedurally and substantively fair.’

SAVAGE ADJP

Nkutha-Nkontwana JA and Govindjee AJA agree.

APPEARANCES:

FOR THE APPELLANT:

E. Masombuka

Instructed by the State Attorney

FOR THE RESPONDENTS:

L. M. Moloi and T A Modisane

Instructed by Luyanda Ngcani Inc.

LABOUR APPEAL COURT