



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D553/2022

Not Reportable

In the matter between:

DURBAN UNIVERSITY OF TECHNOLOGY

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER BESS PILLEMER N.O.

Second Respondent

LUNGA ALLEN SABATHA KHUMALO

Third Respondent

Heard: 12 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 14h00 on 23 July 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] In the present review application the applicant sought to set aside the arbitration award issued by the second respondent in which she found the third respondent's dismissal to have been substantively and procedurally unfair, and to substitute her award with findings to the contrary. The third respondent opposed the relief so sought.

[2] As the applicant's review application had been initiated one day outside the time period permitted therefor it applied for condonation. Given the insignificance of the delay, the explanation therefor, and the absence of any prejudice to the third respondent who did not oppose the granting of such order, there is no reason for this court not to exercise its discretion in favour of the order sought, and condonation will accordingly be granted.

Background

[3] The third respondent was dismissed on 22 June 2021 pursuant to having been found to have committed the following act of misconduct,

'It is alleged that you submitted, or caused to be submitted, a false statement to the Labour Court in that you are an employee of Nehawu, and in the capacity as a National Legal Officer of National Education Health & Allied Workers Union (Nehawu). You knew, or ought to have known, that your submission was false and constitutes an act of perjury as it was issued under oath.'

[4] The statement in question was made in a founding affidavit deposed to by the third respondent on 21 August 2020 in support of an application issued in this court under D383/2020 by three trade unions (NEHAWU, TENUSA and NTEU) in which the applicant in the present proceedings was sought to be interdicted from taking certain action in relation to its employees. The applicant took issue with the third respondent's statement at paragraph 1 of the founding affidavit which read,

'I am an adult male, National Legal Officer for the First Applicant, whose place of employment is situated at 5[...] M[...] Street, M[...], Johannesburg.'

[5] In disciplinary proceedings initiated by the applicant on 27 November 2020 the third respondent did not dispute that the statement in question had been incorrect: he conceded that he was not an employee of NEHAWU, let alone its national legal officer, employed at the address mentioned. On the contrary, it was common cause that he was, and had at all material times, been an employee of the applicant, employed in its IT Department as a Desktop Practitioner. In dispute between the parties was what had motivated the third respondent to make the statement in question. It was the applicant's case that the third respondent had done so deliberately, with the intention to deceive. The third respondent, on the other hand, asserted that the statement had been made in error.

[6] The chairperson appointed to the disciplinary enquiry found that the third respondent's misstatement of his own credentials had indeed been in error, but nonetheless found him guilty of the infraction alleged,

'However, although I accept Mr Khumalo's argument that the contents of paragraph 1 were made in error, there is a principle in our law which states caveat subscriptor.¹ He should have read the affidavit properly and carefully and should have seen there was an error. He should have asked his attorney to rectify the mistake. He did not do so. He initialled the page as if it were correct and signed the affidavit under oath.'

[7] Pursuant to having adjourned the matter for the parties to address him on aggravating and mitigating factors, on 30 April 2021 the chairperson recommended that the third respondent be dismissed *'as soon as practically possible.'* The applicant accepted the chairperson's recommendation and notified the third respondent of the termination of his employment on 3 May 2021. Having

¹ The *caveat subscriptor* rule was established in Burger v Central SAR 1903 TS 571, in which the court was required to determine whether one contracting party was bound to the terms of a contract which he alleged he had not read, *'It is a sound principle of law that a man, when he signs a contract,*

unsuccessfully challenged the outcome of the disciplinary enquiry by way of the applicant's appeal process, he was dismissed from the applicant's employ on 22 June 2021.

[8] The third respondent referred a dispute to CCMA in which he challenged the substantive and procedural fairness of his dismissal. His challenge to the substantive fairness of his dismissal was premised upon his assertion that he had not been guilty of the misconduct for which he had been charged. Insofar as the procedure adopted by the applicant was concerned, it was his case that the applicant had not adhered to the procedure prescribed in its own Disciplinary Policy and Procedure.

[9] It is the outcome of the ensuing arbitration which forms the subject matter of the present review application, the second respondent having found that the third respondent's dismissal had been both substantively and procedurally unfair, and having awarded his retrospective reinstatement.

Analysis

[10] In seeking to review the award the applicant asserted that the second respondent arrived at a decision no reasonable decision maker could have reached having regard to the evidence before her; having acted unreasonably in the execution of her duties and responsibilities as arbitrator; having failed to apply her mind to the law and the evidence before her; and having committed a gross irregularity by having misconstrued the import of the evidence before her as well as the enquiry she was required to undertake.

[11] Insofar as the second respondent's finding concerning the substantive unfairness of the third respondent's dismissal was concerned, and in amplification of its assertion that such finding was unreasonable, the applicant articulated a variety of complaints concerning the second respondent's assessment of the evidence before her, concluding that,

is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.'

‘On a complete assessment of these factors, it supports that the Third Respondent did in fact act intentionally and dishonestly – and this was by no means a “genuine mistake that was acknowledged, and the correct position as corrected in the opposing affidavit accepted”, as she contends at paragraph 9.1 of the Award.’

[12] An award will be reviewed and corrected only if it fails to meet the standard of reasonableness, as explained in Herholdt v Nedbank Ltd (Congress of South African Trade Unions as *amicus curiae*) [2013] 11 BLLR 1074 (SCA),

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

The reasonableness or otherwise of the second respondent's conclusion that the third respondent had been unfairly dismissed will accordingly be considered holistically in relation to the evidence before her.

[13] The parties concluded a pre-arbitration conference, the minute of which was placed before the second respondent, and in which the third respondent's denial that he was guilty of the charge was re-iterated. It having been common cause between the parties that the information captured in paragraph 1 of the founding affidavit deposed to by the third respondent under case number D383/2020 had been incorrect, they agreed that the second respondent's finding concerning whether the he had committed the offence alleged required her to determine, *‘[w]hether the Applicant acted intentionally and/or dishonestly when he deposed to the founding affidavit, specifically paragraph 1.’*

[14] The only witness to testify on behalf of the applicant in support of its case that the third respondent's statement had been a deliberate untruth was Mr Augustine Mxolisi Msomi, its Acting Senior Director: Human Capital Services. In his evidence in chief he described the circumstances in which the third respondent's founding

affidavit had come into existence, the applicant's response thereto, and the manner in which the applicant's response was dealt with by the third respondent. In consideration of these issues it is evident that the applicant (1) assumed that the misstatement in the founding affidavit had been a deliberate act on the part of the third respondent, and (2) was of the opinion that he had failed adequately to address the issue in reply and had thereby perpetuated the lie.

[15] Although Mr Msomi could point to no direct evidence to substantiate his belief that the third respondent's misstatement had been deliberate, he refused to accept that such statement had been nothing more than an error under cross-examination. He was also unable to provide an explanation as to what may have motivated the third respondent to have misrepresented his credentials. Additionally, his response to the question as to whether he had been misled by the statement, given that he was very familiar with the third respondent by virtue of their workplace interactions, was that he had been unaware that the third respondent had been NEHAWU's national legal officer. This contradicted the position taken by him in his own answering affidavit under D383/2020, in which he unequivocally denied that the third respondent held such a position.

[16] The third respondent testified that the designation attributed to him in the founding affidavit in question had never been one claimed by him. Upon receipt of the draft founding affidavit he noted his name, and thereafter focussed his attention on the material facts of the dispute. Without having noticed that his designation and address were erroneously captured in the draft affidavit, he signed it before a commissioner of oaths. His version that this had been no more than a mistake remained steadfast under cross-examination, and was confirmed by the attorney responsible for the application, Mr Adrian Moodley, who described the circumstances which led to the inclusion of the offending paragraph having been as a result of an error of drafting by counsel.

[17] In the present proceedings in response to this court having questioned what possible advantage the third respondent could have obtained from misrepresenting his true position, Mr Lawrence for the applicant suggested that it may have affected

the issue of *locus standi* under D383/2020, albeit that he reiterated that this had not been the applicant's case.

[18] In the arbitration the applicant argued further that the third respondent's dishonesty *ab initio* was established by the manner in which the third respondent had responded to the applicant's answering affidavit delivered under D383/2020. In the answering affidavit, and in response to the statement contained in paragraph 1 of the founding affidavit, Mr Msomi stated,

'26.1 The contents of these paragraphs are disputed.'

26.2 The deponent, Lunga Alan Sabatha Khumalo, is an employee of the Respondent and is employed at the Respondent situated at 4[...] ML S[...] Road, G[...], Durban. The deponent however states that his place of employment is situated at 5[...] M[...] Street, M[...], Johannesburg.'

[19] In the subsequent replying affidavit the third respondent stated,

'The Applicants admit that the address of the deponent was an error and it is as alleged by the Respondent. The remaining allegations in these paragraphs are noted.'

[20] Mr Msomi explained that the applicant took the view that, in consideration of the applicant's challenge to the allegations made in paragraph 1 and the third respondent's response thereto, the third respondent had thereby continued to perpetuate the falsehood regarding his own designation. His interpretation of the response was that it constituted no more than a concession that the address was wrong; insofar as the third respondent's remaining assertions were concerned, the third respondent had not corrected the position, which left the issue disputed between the parties.

[21] The third respondent testified that the issue of the error had been drawn to his attention when he consulted with NEHAWU's legal representatives for the purpose of drafting the replying affidavit. It was explained to him that the applicant had identified

the error, and that it had been corrected in his replying affidavit. Mr Moodley's evidence accorded with this version.

[22] The applicant bore the onus to establish that the dismissal of the third respondent had been substantively fair. To do so, it was required to have established that it was more probable than not that the third respondent had intentionally attempted to perpetrate the fiction that he was employed by NEHAWU in the capacity of its national legal officer at its offices in Johannesburg. In circumstances in which it had no direct evidence of such intent, it relied upon the inference to be drawn from the third respondent's response to its answering affidavit under D383/2020. It was the applicant's case that the third respondent had dealt only with the issue of his address, leaving the issues of both this status as an employee of the DUT and not NEHAWU, as well as the position he occupied as had been conveyed by him in his founding affidavit.

[23] At the outset it may be noted that neither of the relevant paragraphs in either the answering and replying affidavits exemplify clarity of drafting. As a matter of convention, there are only three appropriate responses to allegations in a litigating party's affidavit: admission, denial, or confession and avoidance. Despite this, the drafters of the respective affidavits resorted to having 'disputed' and 'noted' factual allegations, with the result being that any reader of such affidavits was required to consider the allegations as a whole, and to consider the effect thereof with reference to established legal principles in order to determine to what extent, if any, the issues contained therein had been placed in dispute.

[24] The starting point for consideration of the third respondent's response in his replying affidavit was the applicant's own statement. At the outset, the applicant 'disputed' the contents of, *inter alia*, paragraph 1 of the third respondent's founding affidavit, without limitation. From this, it may be understood that the applicant intended to deny the correctness of the paragraph in its entirety. This interpretation accorded with Mr Msomi's evidence that the purpose of his response was to dispute the correctness of the third respondent's assertions,

‘Actually in this paragraph it was disputed the submission that was made in the founding affidavit, that is the applicant in this matter was an employee of NEHAWU as a legal officer based in Marshall Street in Johannesburg. That paragraph was inserted there just to dispute that particular assertion that was given on the affidavit.’

In amplification of such denial, Mr Msomi asserted that the third respondent was the applicant’s own employee, employed at its premises in Durban.

[25] The third respondent’s response to the applicant’s allegations constituted three parts: (1) he admitted that the correct address was that which had been stated by the applicant; (2) he asserted that the address mentioned by him had been in error; and (3) he ‘noted’ the remaining allegations in the paragraph.

[26] The third respondent accordingly expressly admitted the correctness of the address alleged by the applicant, and disavowed the correctness of the address which had been alleged by him in his founding affidavit. Ancillary to this, he explained the address alleged by him had been erroneously given. Whilst his ‘noting’ of the remainder of the paragraph was not an unequivocal admission of its contents, in context, that this was his intention is the most reasonable interpretation to be given to the term, ‘noted’. The third respondent had readily acquiesced to the error of the address originally stated, which address was inextricably linked to his alleged employment by NEHAWU. Implicit in his abandonment of the original address, together with his concomitant acceptance of the address cited by the applicant as having been his place of employment, was his contemporaneous acceptance of the correctness of the allegation that he was employed by the applicant.

[27] To the extent that it was argued that despite this, it remained open for a reader of the affidavits to believe that the third respondent may have been employed by both the DUT and NEHAWU, the applicant’s denial that he was employed by NEHAWU was unchallenged in reply by the third respondent. Insofar as those issues which had been denied by the applicant but which were not expressly dealt with by the third respondent were concerned, it is trite that any of the applicant’s allegations

which were neither admitted (with or without avoidance) or denied, were to be taken as having been accepted as being correct.²

[28] Finally, the applicant did not dispute that the third respondent had not himself drafted the replying affidavit, and that to that end he had relied upon the assistance of both an attorney and an advocate. There was accordingly no reason to reject the third respondent's version that issue of the erroneous addressed had been addressed in the course of the consultation, and that he presumed, himself not being legally trained, that the issue had been adequately dealt with.

[29] Having narrowed the issues in their pre-arbitration conference, the parties correctly identified that one of the essential elements of the commission of an act of perjury (being the misconduct for which the third respondent was dismissed) was intent (the remaining elements being a false statement; made in an affidavit, affirmation or attested declaration; before a competent person).

[30] In consideration of the totality of the evidence before the second respondent, nothing supported the applicant's claim that the third respondent had deliberately set about attempting to deceive anyone who read his affidavits, including this court. Regardless of who may or may not have believed the statement contained in his founding affidavit, the issue was the cause thereof, not its effect. There was no basis upon which the second respondent ought to have rejected the third respondent's explanation that the offending paragraph had been included in error, or that he had believed that his replying affidavit had adequately resolved the issue.

[31] Given that the applicant's case that the third respondent had intentionally misrepresented his status in his founding affidavit was premised on no more than its own assumptions, that the third respondent's replying affidavit did not evince the perpetuation of his erroneous statement, and given further that there was no reason for the second respondent to have rejected the third respondent's version, the second respondent's conclusion that the third respondent's dismissal had been substantively unfair was not a conclusion which no reasonable decision maker could not have arrived at.

² Moosa v Knox 1949 (3) SA 327 (N)

[32] It was the applicant's further case that the second respondent had unreasonably failed to find that re-instatement was an inappropriate remedy, in consideration of the nature of the charge, and the subsequent conduct of the third respondent post fact the misrepresentation, even if it had been an error.

[33] Having found that the third respondent was to be exonerated of any act of misconduct, it was incumbent upon the second respondent to determine the appropriate remedy. It is trite that, absent the presence of any impediment to the reinstatement of an employee whose dismissal has been found to have been substantively unfair, he or she is entitled to such an award. No evidence was placed before the second respondent by the applicant which could have operated as a bar to the third respondent's reinstatement. The same is true of the second respondent's decision to make the third respondent's reinstatement fully retrospective.

[34] Despite the applicant having been aware of the fact that the amount awarded to the third respondent constituted back pay, the applicant nonetheless took issue with the second respondent's award of 'compensation', having asserted that compensation equivalent to in excess of fourteen months of his salary was unreasonable, and in its Heads of Argument that it was in excess of the limitation imposed in terms of s194 of the LRA. The amount awarded to the third respondent was his arrear salary, awarded to him on the basis of his having been awarded retrospective reinstatement. As it was not awarded as an amount of compensation, the limitation imposed on commissioners in terms of s194(1) of the LRA was irrelevant.

[35] The applicant's final grounds of review relate to the second respondent's finding that the third respondent's dismissal had been procedurally unfair. As pointed out by the third respondent, as no consequential relief arose out of such finding, the conclusions reached by the second respondent were immaterial to the outcome. This issue will accordingly be dealt with for the sake of completeness only.

[36] The second respondent's finding arose from her conclusion that (1) despite that the applicant's disciplinary code had not made provision for legal representation,

and its Council had not authorised any deviation therefrom, the applicant had nevertheless utilised an external legal representative as its evidence leader in the third respondent's disciplinary enquiry, and (2) despite the fact that the third respondent's representative had tested positive for COVID and he had applied for a postponement on the basis of her unavailability, the postponement was refused.

[37] Mr Msomi testified that the applicant's disciplinary code was a guideline which could be departed from in appropriate circumstances, and that this instance was such a circumstance. In circumstances in which the applicant had previously sought to depart from the provisions of its own disciplinary code it had done so with the express authorisation of its EXCO and its Council, that its disciplinary code could be construed as a mere guideline is doubtful. Be that as it may, the applicant referred this court to the conclusions of the Labour Appeal Court in Highveld District Council v Commission for Conciliation Mediation and Arbitration and Others (2003) 24 ILJ 517 (LAC),

*'The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed was unfair. ... When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all the circumstances the procedure was fair.'*³

[38] In consideration of the second respondent's reasoning in relation to this aspect, it is evident that she was of the opinion that departure from the disciplinary code would have necessitated consideration by the applicant's council of the likelihood of *'the imbalance and unfairness on an employee having to pay for his legal representation'*, which did not happen in relation to the third respondent. In the circumstances, her conclusion was informed by not only the departure from the disciplinary code itself, but also the effect thereof. Such conclusion, as with her further conclusion that the appeal process was tainted by unfairness in light of having proceeded in the absence of the third respondent's representative who was

³ At paragraph 15

likely to have been of assistance to the third respondent in having articulated his appeal, was accordingly not one which was unreasonable.

Costs

[39] Mr Lawrance argued that in the event that the application did not succeed, it would be appropriate that no order of costs be made as the employment relationship between the parties would thereby be revived. Mr Rudling, who appeared for the third respondent, persisted in the third respondent's prayer for costs.

[40] The applicant's own Chairperson, despite having recommended the third respondent's dismissal, found as a matter of fact that an error had resulted in the inclusion of the offending paragraph in the founding affidavit in question. The second respondent found the applicant's contention that the third respondent had been guilty of perjury to have been 'ridiculous'. This court concurs with the view expressed by Mr Rudling that the present application was 'patently groundless.'

[41] In light of the circumstances of the third respondent's dismissal and the patent cogency of the second respondent's award, this court is of the view that the third respondent ought not to be mulcted with the costs of opposition. Albeit that the third respondent sought costs on an attorney and client scale, this court is not of the opinion that costs on such scale is warranted.

Order

1. The late initiation of the application is condoned.
2. The application is dismissed.
3. The applicant is ordered to pay the third respondent's costs.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr I Lawrence, Edward Nathan Sonnenbergs Inc

Third Respondent:

Mr M Rudling, instructed by J Philip Attorneys

LABOUR COURT