IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Labour Appeal Court Case no: JA56/2015

Labour Court Case no: JR1676/2012

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY	**Appellant**
and	
SOUTH AFRICAN MUNICIPAL WORKERS UNION	**First Respondent**
SKHOSANA, B W S	**Second Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Third Respondent**
MATLALA, M L, N. O.	**Fourth Respondent**

Heard: **30 November 2017**

Delivered: **18 December 2017**

Summary: An arbitrator held that the dismissal of an employee for participation in a violent disruption of a disciplinary enquiry was substantively fair, but because that dismissal was not preceded by an enquiry into the act of disruption *per se*, it was procedurally unfair. Because of the egregious conduct which justified the dismissal,

in the exercise of a discretion, the arbitrator made no compensation order as contemplated by section 94(1) of the LRA

The employee brought a review and the labour court concluded, on the basis that a collective agreement that was binding on the parties which prescribed an enquiry before a dismissal could be effected, had not been observed, the arbitrator had misdirected himself and set the award aside and remitted the matter for a fresh arbitration

On appeal the Labour court's order was set aside and the award confirmed

Held: the collective agreement argument was a red herring – the dispute referred was an unfair dismissal case as contemplated by section 186, not a dispute about a breach of a collective agreement, a species of dispute regulated by section 24

Held: on the facts the dismissal was plainly fair

Held: on the facts, the finding that the dismissal was procedurally unfair solely because there had been no prior hearing in the circumstances where the employee disrupted a disciplinary enquiry, had not been subjected to a cross review or cross appeal, and thus, it was not open to the appeal court to express a view on the propriety of that finding which had to stand

Held: the exercise of the arbitrator's discretion not to award any compensation was, on the facts, a wholly proper decision, fully consistent with the test in *Sidumo* that it could not be said that the decision was one to which a reasonable arbitrator could not come.

Coram: Musi, Coppin et Sutherland JJJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] This appeal is against an order of the Labour Court reviewing and setting aside an award given under the auspices of the Third Respondent. The award was that the dismissal of the second respondent (Skhosana) had been procedurally unfair for want of an enquiry before dismissal, but substantively fair, and, because the misconduct was so egregious, no compensation ought to be awarded for the unfair procedure. The Court *a quo* held that the arbitrator had misdirected himself by failing to give consideration to provisions in a collective agreement that made the holding of an enquiry a condition precedent to a dismissal. The relief granted was to set aside the award and remit it for a fresh hearing.

[2] The appellant failed to comply with the requirements of the rules of court in prosecuting the appeal. The filing of the record was 35 days late. As a result, it has been necessary to apply for the appeal to be reinstated. The failure has been satisfactorily explained as resulting from administrative difficulties in preparing the record. The appellant was also remiss in filing its heads of argument timeously; the heads were filed nine days late. The latter failure is slight and caused no party any prejudice, least of all in expediting a hearing of the appeal. The prospects of success of the appeal are a material consideration. Because the view we have taken of the prospects of success are positive, as addressed hereafter, and because the non-compliance with the rules and directives of the court are inconsequential, condonation of the late filings ought to be granted and the appeal ought to be reinstated.

[3] The critical issue on appeal is whether the award was indeed susceptible to a review on the basis so found by the court *a quo,* and, more especially, whether the

award satisfied the test in *Sidumo; ie* that the conclusions in the award were such that no reasonable arbitrator could reach such conclusions.[1]

The critical facts and issues leading up to the award

[4] Skhosana and six co-workers had been subjected to a disciplinary enquiry. The enquiry was protracted and hopped along for several months, having been instituted in June 2010. On 11 February 2011, the eighth occasion the enquiry had been convened before an independent chairman, Nolan, the enquiry broke up amidst violence, the chairman being assaulted, the recording device disrupted, and the chairman's cell phone, with which he tried to record the fracas, being forcibly taken from him and thrown against a wall.

[5] As a result, the enquiry was abandoned. The employer then summarily dismissed all seven employees. Those who had physically engaged with the chair were reported to the police and a criminal charge laid. Skhosana was among those who were present during the melee. A letter of dismissal to Skhosana, dated 11 February 2011, recounted the history of the enquiry, alluded to the persistent disruptions, and concluded by stating, insofar as material to this matter thus:

> ' ….
>
> The conduct you displayed by inciting and instigating the assault and/or partaking in the assault on the person of Mr Darien Nolan, the presiding officer, on the 11th February 2011.
>
> To this end your conduct constituted gross misconduct and [has] rendered the conduct of a legitimate disciplinary process impossible.
>
> Given the responsibility and position you hold in our employ and as a leader/shopsteward of the recognised trade union, you wittingly failed to ensure that you are provided with a fair opportunity to present your case to prove your innocence in the allegations levelled against you by the employer.

[1] *Sidumo and Others v Rustenburg Platinum Mines and Others* (2007) 28 ILJ 2405 (CC).

> In the circumstances and the context of your conduct you have effectively by way of your conduct waived your right to present your side of the story in front of an impartial presiding officer.
>
> Your contract of employment ….is terminated with immediate effect.'

[6] Self-evidently, no disciplinary enquiry was held into the events of 11 February. The option of suspending Skhosana and then running a fresh enquiry was not taken up.

[7] Skhosana referred an unfair dismissal dispute to arbitration. In that arbitration, evidence was adduced from three eye witnesses that she did not physically engage with the chairman during the attack on him, but that she and one other person stood into the doorway, inhibiting egress, and shouted "mshaye" ie "*hit him, hit him*" as the chairman was being assaulted. Terrence Pharo, a manager of the appellant who was present, had to use force to get through the door, in the face of the respondent and another co-worker blocking access to the door. The significance of that testimony was that the respondent made common cause with the assault and the deliberate disruption of the proceedings.

[8] Skhosana testified that she was, throughout the affair, mute and seated at the back of the room. She denied the allegations against her. She conceded the fracas which she said was the fault of Nolan who sought to record the disruption.

[9] The task of the arbitrator was thus to make a credibility finding about what facts were to found proven. The arbitrator concluded that the version implicating her was preferable. Accordingly, it was concluded that she committed the misconduct complained of.

[10] As to the absence of an enquiry, the employer was criticised on the basis that no sound reason existed not to convene an enquiry into her alleged misconduct on 11 February. There was no consideration given to whether the circumstances that prevailed were such as to excuse the employer from holding an enquiry as contemplated in paragraph 4 of the code of good practice on dismissal in schedule

8 to the Labour Relations Act 66 of 1995 (LRA). In the absence of a cross-review and cross-appeal, this dimension of the matter shall not be explored.

[11] An issue raised pertinently in the respondent's heads of argument and a central aspect of the review application and the judgment *a quo* was the provision in the disciplinary code, a part of a collective agreement between the appellant and the respondents' trade union, for an enquiry to precede disciplinary sanctions. It was not pressed in argument before us, but owing to its significance in the reasoning offered by the court *a quo*, it is appropriate to address the point. In the course of the arbitration, the representative for Skosana alluded to the collective agreement binding on the employer. Among its provisions was clause 7 of that collective agreement which provides:

> '7.1.1: The rules of natural justice must be observed in the conduct of proceedings.
>
> 7.1.2: Unless otherwise agreed to by the parties, the hearing must be adversarial in nature and character'.

The contention was advanced on behalf of Skhosana that the common cause failure to hold an enquiry prior to dismissal was a contravention of the collective agreement.

<u>The review judgment a quo</u>

[12] The review grounds raised in the founding affidavit were threefold; first, that it was unfair to find that despite the dismissal being procedurally unfair, no compensation was granted; second, the factual findings rejecting her version, were wrong; and third, that the conclusion that she had shown no remorse was inappropriate as no opportunity could exist in the absence of an enquiry. A supplementary founding affidavit was filed raising another ground; ie that the dismissal was in breach of a collective agreement and contended that because the arbitrator did not address that point, on such a ground alone, the award could not stand.

[13] The burden of the judgment given *a quo* was the issue of the non-compliance with provisions of the collective agreement as regards an enquiry. The court *a quo*

reached the conclusion that the arbitrator had misdirected himself about the "type of enquiry" he had to embark on and should have examined and applied the collective agreement.

Evaluation

The rationale of the judgment a quo

[14] It is argued on behalf of the appellant that the court *a quo* misdirected itself in the approach it adopted to decide the review. The thesis is that the point of departure ought to be first to identify the cause of action that was referred to arbitration. That cause of action, it is contended, is an alleged unfair dismissal, not an alleged breach of a collective agreement. The submission is sound. Indeed, a claim based on a breach of a collective agreement is one that is regulated by section 24 of the LRA.[2] The dispute referred in this case is about an alleged unfair dismissal and is regulated by section 191 of the LRA.[3] Moreover, the relief sought is that which is

[2] The relevant portion of Section 24 provides;
Disputes about collective agreements
(1) Every *collective agreement* excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158 (1) *(c)*, must provide for a procedure to resolve any dispute about the interpretation or application of the *collective agreement*. The procedure must first require the parties to attempt to resolve the *dispute* through conciliation and, if the *dispute* remains unresolved, to resolve it through arbitration.
(2) If there is a *dispute* about the interpretation or application of a *collective agreement*, any party to the *dispute* may refer the *dispute* in writing to the Commission if-
(a) the *collective agreement* does not provide for a procedure as required by subsection (1);
(b) the procedure provided for in the *collective agreement* is not operative; or
(c) any party to the *collective agreement* has frustrated the resolution of the *dispute* in terms of the *collective agreement*.
(3) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.
(4) The Commission must attempt to resolve the *dispute* through conciliation.
(5) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration.'

[3] The relevant portion of section 191 provides:
(1) *(a)* If there is a *dispute* about the fairness of a *dismissal*, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the *dispute* in writing to-
(i) ….
(ii) the Commission ….
(b) ….
(2)…(3)
(5) If the *dispute* remains unresolved-
(a) …. the Commission must arbitrate the *dispute* at the request of the *employee* if-

regulated by section 193 of the LRA which provides remedies for unfair dismissals, not breaches of a collective agreement.

[15] Moreover, this Court has addressed the marginality of a collective agreement in relation to an unfair dismissal in *Highveld District Council v CCMA and Others.*[4] The remarks at [14] – 16] are apposite.

> '[14] The relevant issue referred to the arbitrator was whether the respondent's dismissal was procedurally fair. Put differently, the respondent sought to vindicate his right in terms of s 185 of the Labour Relations Act 66 of 1995 (the Act) not to be unfairly dismissed. More specifically, the respondent sought to vindicate his right in terms of s 188(1)*(b)* of the Act to be dismissed only in accordance with a fair procedure. It is a right separate and distinct from the respondent's contractual rights in terms of the collective agreement.
>
> [15] Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will ordinarily go a long way towards proving that the procedure is fair as contemplated in s 188(1)*(b)*. 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. Mr *Venter* for the respondent referred us to the arbitration award in *Ned v Department of Social Services & Population Development* (2001) 22 ILJ 1039 (BCA) where (at 1044B) the arbitrator said: 'The failure to honour an obligation expressly undertaken, is per se unfair conduct.' I must point out that an arbitrator's award does not constitute an authoritative precedent.
>
> In any event, read in its full context, especially in the context of what is said at 1040 of the report, I do not think that the arbitrator in that case was stating a general proposition that failure to comply with an agreed disciplinary procedure in itself constitutes an unfair procedure in breach of the Act. If, however, Mr *Venter* was

(i) the *employee* has alleged that the reason for *dismissal* is related to the *employee's* conduct ….

[4] (2003) 24 ILJ 517 (LAC).

> correct and that is what the arbitrator said in the *Ned* case, I cannot agree. 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 (*Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1171 (LAC)).
>
> [16] It does not follow from this conclusion that a contractual procedure does not give rise to contractual rights that a contracting party can enforce in the appropriate forum and in the appropriate manner. In this case, however, we are not called upon to adjudicate a contractual right, but a statutory right to a dismissal that is procedurally fair.' (underlining supplied)

[16] The court *a quo* relied heavily decision in *Steven Ngubeni v National youth Development agency*,[5] to justify the focus on the collective agreement as the central issue. However, the decision is plainly distinguishable. In that case, the cause of action relied on by *Ngubeni* was a contractual right and he came before the court pursuant to the Labour Court's concurrent civil jurisdiction in terms of Section 77(3) of the Basic Conditions of Employment Act 75 of 1997. What was sought there was specific performance of a contractual right to an enquiry prior to a lawful termination of a contract, not an unfair dismissal dispute, which is the cause of action in this matter. It is not open to a court to conflate the two causes of action.

[17] Accordingly, the court *a quo* indeed approached the matter incorrectly.

The award

[18] It is useful to be reminded of the test for review in *Sidumo*. The test is concerned with outcomes, not the process by which the outcomes are achieved. Only when the outcome is one which no reasonable arbitrator, with the material that was to hand, could produce, is an award liable to be set aside. The frailties of an arbitrator's reasoning, or inattention to mentioning every facet of relevance, or clumsiness in

[5] The correct citation is (2014) 35 ILJ 1345 (LC).

articulation are unimportant, unless they are causally connected to an unfair outcome.

[19] In my view, the award is unassailable.

[20] The decision reached on the substantive fairness leg is supported by witnesses whose credibility was in contestation with that of Skhosana. The function of the arbitrator is to make credibility findings. Nothing in the record suggests that the arbitrator's conclusions are findings which no reasonable arbitrator could make. The factual findings are not shown to be in error, indeed the overwhelming weight of evidence and the probabilities supports the conclusions. This is illustrated boldly by the fact that the evidence of Siyabonga Mpontshana, the attorney appointed to prosecute the case, whose evidence about the fracas was that the respondent was among those who howled and shouted, and who exhorted the others to beat him up when he tried to intervene in the attack on the chairman, was never challenged by a contrary version being put to him in cross-examination.

[21] As to procedural fairness, the view taken by the arbitrator was that it was open to the employer to have convened a pre-dismissal enquiry. It has already been mentioned that in the absence of a cross- review on this conclusion it is unnecessary to consider whether it might indeed have been excusable to convene another enquiry when the very misconduct was the rendering of an enquiry impossible. The criticism by the arbitrator therefore stands.

[22] Section 194(1) of the LRA requires any compensation to be "just and equitable" in the circumstances. The subsequent decision of the arbitrator not to award compensation on the grounds that the riotous behaviour by Skhosana and her co-workers in the enquiry was so serious that it warranted a deviation from the usual response to procedural unfairness was, in the circumstances, a proper exercise of discretion and is not assailable.[6] In addition, it may be mentioned that the

[6] The reliance by the arbitrator on the decision in *Johnson & Johnson v CWIU* (1999) 20 ILJ 89 (LAC) at [51] was apposite in the circumstances. In that matter a procedurally unfair retrenchment attracted no

respondent, when exercising her right to *audi alterem partem* in the arbitration proceedings persisted with a mendacious denial of the facts and therefore showed no remorse whatsoever when that opportunity was available to her. Also, no less important was the standing and role of the respondent in the appellant's employ, which if anything was rightly weighed as aggravation.

Conclusions and costs

[23] The appeal must be upheld.

[24] Both parties seek costs.

[25] The Review court made no order as to costs; however, it is appropriate that the appellant, in the circumstances, ought to be granted costs of those proceedings too.

The Order

(1) The failures of the appellant to comply with the requirements of the court as to the timeous filing of an appeal record and of heads of argument are condoned.

(2) The appeal is reinstated.

(3) The appeal is upheld.

(4) The order of the Labour Court is set aside.

(5) The award is confirmed.

(6) The first and second respondents shall bear the appellant's costs in the review and in the appeal, jointly and severally, the one paying the other to be absolved.

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compensation order because of the 'unreasonable obstinacy' of the union who sought to exploit a procedural error despite a tender by the employer to retract and fully comply with section 189 of the LRA.

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Sutherland JA

Sutherland JA (with whom Musi and Coppin JJA concur)

APPEARANCES:

FOR THE APPELLANT:	Adv N A Cassim SC Instructed by Tshiqi Zebediela Inc.
FOR THE FIRST AND SECOND RESPONDENTS:	Adv D V Nxumalo Instructed by Cheadle Thompson and Haysom.