IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 3/2016

In the matter between:

MATATIELE LOCAL MUNICIPALITY **Appellant**

and

RASHIDA SHAIK (CARRIM) **First Respondent**

SOUTH AFRICA LOCAL GOVERNMENT

BARGAINING COUNCIL **Second Respondent**

COMMISSIONER MXOLISI ALEX NOSIGQWABA **Third Respondent**

Heard: **10 November 2016**

Delivered: **13 June 2017**

Summary: An arbitrator of the SALGBC held that the dismissal of an employee was void because the disciplinary hearing was held later than required by clause 6.3 of the Code and ordered the reinstatement of the employee. Held on appeal that the LRA does not contemplate an arbitrator remedying a void dismissal. The three-month period commences when the municipal official authorised to institute disciplinary hearing becomes aware of the alleged misconduct and the identity of the alleged perpetrator. A disciplinary inquiry 'proceeds' when the

offending employee is supplied with the charges. The dismissal was valid. The matter was remitted to the bargaining council to determine whether the dismissal was fair.

Coram: Tlaletsi DJP, Ndlovu JA, and Landman JA

Neutral citation: **Shaik v Matatiele Local Municipality** (LAC DA 3/2016)

JUDGMENT

LANDMAN JA

[1] Regrettably, our colleague Ndlovu JA passed away after judgment had been reserved.

[2] Matatiele Local Municipality, the appellant, appeals against a judgment of the Labour Court (Basson J) delivered on 1 December 2015 that dismissed the appellant's application to review and set aside a decision of Commissioner M A Nosigqwaba, acting under the auspices of the South Africa Local Government Bargaining Council, that the dismissal of Ms Shaik (hereafter 'the employee'), was void and of no force or effect and reinstating her with back-pay.

Background

[3] The employee was employed by the appellant. On 15 February 2014, she informed the General Manager (Corporate Services) by Short Messages Services that she would not be attending a meeting scheduled for 15-19 February. The General Manager acknowledged receipt of her communication. On 1 April 2014, the employee was suspended from her employment.

[4] The appellant decided to charge the employee with six charges. On 14 May 2014, she received the charges and a notice to attend a disciplinary hearing on

21-22 May. But on 19 May, she was given a notice rescheduling the hearing for 20 to 21 May. The employee complained that she was not given sufficient time to prepare her defence. The hearing was rescheduled for 27-28 May but only proceeded on 3 June and led to the dismissal of the employee.

[5] The employee referred a dispute to the Bargaining Council. At the commencement of the subsequent arbitration hearing, the employee raised six points *in limine*. The most important one is that she was unfairly subjected to a disciplinary hearing and that her dismissal was void as it was held outside the time limit prescribed in terms of clause 6.3 of the SALGBC Disciplinary Code Collective Agreement. This clause reads:

> 'The employer shall proceed forthwith or as soon as reasonably possible with a disciplinary hearing but in any event not later than three (3) months from the date upon which the employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for consideration to the relevant division of the SALGBC.'

[6] The commissioner agreed with the employee's principal submission and found that the dismissal was void and of no legal effect. Although the employee sought compensation, the commissioner ordered the municipality to reinstate her with back-pay.

The judgment of the court *a quo*

[7] The court *a quo*:

(a) found that an employer could agree to limit its right to take disciplinary action against employees.

(b) found the code was peremptory and that the appellant was bound by the limitation set out in clause 6.3 of the code.

(c) found that the appellant was precluded from proceeding with the disciplinary hearing as regards the employee until it has applied for and received condonation from the bargaining council.

(d) found that the appellant had not applied for condonation and that the dismissal was void and of no legal effect.

(e) rejected the proposition in *Tsengwa v Knysa Municipality and Another*[1] (that declined to follow *Jacob v City of Cape Town and Others*[2]) that a commissioner is restricted to considering the fairness of a dismissal and could not decide on the validity of a dismissal.

(f) dismissed the appellant's review application leaving the award intact.

Evaluation

[8] A bargaining council exists for several well-defined purposes. One such purpose is to remedy, by means of arbitration in accordance with the LRA, disputes concerning alleged unfair labour practices. The jurisdictional threshold for a dispute about an unfair dismissal is that the employee must prove that he or she has been dismissed from employment. Should an employee inform and persuade an arbitrator that his or her dismissal is invalid and of no legal effect, it means that the employee has not been dismissed. Whatever actions the employer may have taken on its view that it has dismissed the employee, including a ban on the employee entering the workplace, there is no dismissal. The result is that the arbitrator has no jurisdiction to address the consequences of such a situation whether by ordering reinstatement, reemployment or awarding compensation. The employee must seek a remedy in another forum ie. in a court of law.

[9] What must be decided in this case is whether the employee had been invalidly dismissed. This requires, in the first place, an analysis of clause 6.3 of the code in order to determine whether it found application in the circumstances of the

[1] [2015] 8 BLLR 857 (LC).
[2] [2014] 10 BLLR 1011 (LC).

case and, if it was breached, the consequences of the breach. But before doing so, it is necessary to consider why the parties to the collective agreement inserted this clause and what its purpose was.

[10] The purpose of the clause was clearly designed to ensure that municipal employees were not to work under a threat of disciplinary action for long periods. In other words, discipline in the local government sector was required to take place expeditiously. To achieve this, a time limit was set that could be extended with the permission of the bargaining council.

> 'became aware of the alleged misconduct '

[11] The period commences, according to clause 6.3, when the municipality is aware of the alleged misconduct. In *Samwu Obo Dlamini and Others v Mogale City Local Municipality and Another,*[3] the Labour Court held that:

> '…being that "aware" must mean the point where the employer is in the position to formulate and present a charge to the employee. As a matter of common sense and logic, this has to mean the existence of a written document containing substantive allegations capable of sustaining a charge, if proven.'

[12] A municipal employer may become aware of the alleged misconduct on the day that it is committed but it may also become aware of the misconduct sometime later when it is discovered. But, tying this into the context of proceeding with a disciplinary hearing, it inevitably means that awareness relates to the time that the municipal official or organ authorised to institute disciplinary hearing becomes aware of the alleged misconduct (including where the official is made aware of the allegations) and, importantly, of the identity of the alleged perpetrator. This will be a factual inquiry.

[13] The arbitrator decided that the municipality became aware of the misconduct on 15 February 2014. This was when her supervisor, a general manager, knew of her failure to attend the meeting. But the commissioner records that it was only in

[3] Unreported judgment delivered on 17 September 2014 under case number J 2245/2014 at para 46.

April that the details of the employee's infractions were provided to the municipal manager who is responsible for instituting disciplinary enquiries.

[14] However, even if 15 February 2014 is the date on which the three-month period began to run, it is not necessarily decisive. The sixth charge related to gross misconduct in that the employee allegedly misled the Speaker of the Municipal Council on 28 March 2014 about the lawfulness of the municipal manager's employment. Therefore, even if charges relating to misconduct committed on 15 February were to fall away, the sixth charge, only commenced running from 28 March at the earliest.

'proceed forthwith'

[15] The employer was obligated by clause 6.3 to "proceed forthwith or as soon as reasonably possible with a disciplinary hearing". The Labour Court has considered the meaning of "proceed" in several judgments.

[16] In *Independent Municipal and Allied Trade Union Obo Dandala v Ekurhuleni Metropolitan Municipality and Others*[4] the Labour Court opined that:

> 'Proceeding with a disciplinary hearing starts when the Municipal Manager appoints a presiding officer. There can be no doubt in my mind that once a presiding officer is appointed an employer will be proceeding with a disciplinary hearing. In my judgment, the processes that follow after the appointment of the presiding officer is all part of proceeding with the disciplinary hearing up to and including the actual commencement of the sittings. Therefore, the relevant outer date is the date on which the presiding officer was appointed and not the date on which the hearing sits as contemplated in clause 6.10.'

[17] I would respectfully disagree with the proposition that "proceeding with a disciplinary hearing starts when the Municipal Manager appoints a presiding officer." The employee may not necessarily know when this occurs. In my view, in keeping with the context that an employee is affected by a disciplinary hearing,

[4] (JR 1026/15) [2016] ZALCJHB 247 (24 June 2016) at para 15.

a hearing proceeds only when there is an external manifestation of the municipality's intention to proceed with a hearing and this occurs when the charges are formally furnished to the alleged offending employee.

[18] On the facts of this case, the charges were furnished to the employee on 14 May 2014.

[19] Even taking 15 February 2015 as the date that the municipality became aware of the misconduct, the last day to proceed with the disciplinary inquiry was 16 May 2014. The respondent was furnished with the charges and notice to attend a disciplinary hearing on 14 May 2014. Consequently, the municipality complied with clause 6.3 of the code.

[20] The result is that the respondent was validly dismissed. The award of the arbitrator falls to be set aside. Whether she was fairly dismissed is a matter for an arbitrator to determine.

Costs

[21] Taking into account the injunction to award costs according to law and fairness, I would make no order for costs in this Court and the court below.

Order

[22] I make the following order:

1. The appeal is upheld.

2. The order of the Labour Court is set aside and replaced with an order reading:

'(1) The application to review and set aside the award of the third respondent issued on 21 April 2015 under case number ECD051408 is granted and the award is set aside.

(2) The matter is remitted to the second respondent for arbitration, before another arbitrator, on the issue whether the dismissal of the first respondent was procedurally and substantively fair.

(3) There is no order as to costs.'

3. There is no order as to the costs of the appeal.

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A A Landman

Judge of the Labour Appeal Court

APPEARANCES:

FOR THE APPELLANT:	Adv M Pillemer SC
	Instructed by Jafta Inc.
FOR THE FIRST RESPONDENT:	Adv De Wet SC (with him Adv Singh)
	Instructed by Cajee Setsubi Chetty Inc.