IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA20/16

In the matter between:

EDUMBE MUNICIPALITY	**Appellant**
and	
THABO PUTINI	**First Respondent**
NHLANHLA MATHE *N.O*	**Second Respondent**
THE SOUTH AFRICAN LOCAL GOVERNMENT BARAGAINING COUNCIL	**Third Respondent**

Held: **22 August 2019**

Delivered: **11 December 2019**

Coram: Waglay JP, Musi JA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This is an appeal against the judgment of the Labour Court (Cele J) dismissing a review application against an award of the second respondent ("the arbitrator"), made under the auspices of the South African Local Government Bargaining Council ("the Bargaining Council"), dismissing an unfair labour practice claim against the Endumbe Municipality ("the Municipality")

[2] The unfair labour practice dispute concerned the alleged unfair suspension of the first respondent, Mr Thabo Putini ("Mr Putini"), by the Municipality.

Background

[3] Mr Putini was employed by the Municipality as its Municipal Manager in terms of a fixed-term contract that was intended to run from 6 August 2008 to 31 December 2011.

[4] On 1 December 2010, the Municipality suspended Mr Putini in terms of clause 14 of his contract of employment which provides that:

> '14.1 The Municipality may suspend the employee on full pay if he is alleged to have committed a serious offence, and the [the Municiplaity] believes that his presence at the workplace might jeopardize any investigation into the alleged misconduct or endanger the wellbeing or safety of any person or municipal property."
>
> 14.2 The employee who is to be suspended shall be notified, in writing, of the reasons for his suspension simultaneously or at least 24 hours after the suspension, he shall have the right to respond within seven (7) working days.
>
> 14.3 If the employee is suspended as a precautionary measure, the employer must hold a disciplinary hearing within (60) days, provided that the chairperson of hearing may extend such period, failing which the suspension shall terminate and the employee shall return to full duty.'

[5] The Municipality placed Mr Putini on a precautionary suspension with full pay.

[6] Following complaints against Mr Putini during 2010, the Council of the Municipality resolved on 10 November 2010 to suspend Mr Putini. The Council wrote to Mr Putini on the same day in order to inform him of the resolution to suspend him and gave him seven days to make submissions on why he should not be suspended.

[7] Mr Putini was apparently on sick leave and did not receive the letter. On return from sick leave on 1 December 2010, he was handed another letter advising him that he was suspended on full pay, with immediate effect, pending an investigation into allegations of misconduct against him. He was not told what those allegations were.

[8] The letter of suspension did not invite Mr Putini to make representations. It peculiarly informed him of the opportunity he was given, in the letter of 10 November 2010, to make submissions on why he should not be suspended, but that the Municipality was unable to hand him that letter as it could not locate him.

[9] In response, Mr Putini did not request an opportunity to make representations on why he should not be suspended but informed the Municipality in writing, on the same day, that he would “accept the suspension”.

[10] His suspension received some publicity in the local press.

[11] On 4 January 2011, the Municipality instructed a firm of auditors, KPMG, to conduct an investigation of the complaints against Mr Putini. Pursuant to this investigation, KPMG prepared a report which raised *prima facie* irregularities involving Mr Putini in procurement, revenue management, financial management irregularities, irregular appointments and promotions, salary increases and his consistent absence from Council meetings.

[12] The Municipality failed to act on the findings of the KPMG investigation and did not institute disciplinary proceedings against Mr Putini which it was obliged to hold within 60 days of his suspension unless that period was extended by the Chairperson of the Council.

[13] By virtue of clause 14.3 of Mr Putini's employment contract, his suspension terminated on or about the end of January 2011. He was then obliged to "return to full duty" but did not do so. However, prior to this, on 12 January 2011, Mr Putini referred an unfair labour practice dispute to the Bargaining Council claiming the upliftment of his suspension and compensation.

[14] In the interim, following on the 2011 municipal elections, there was a change in the political control of the Municipality's Council. Those councillors who had elected to take disciplinary action against Mr Putini were now out of office. At its first meeting, the newly constituted Council, having considered the position of Mr Putini and the unfair labour practice dispute which he had initiated, resolved, *inter alia*, that his suspension be uplifted with immediate effect.

[15] The unfair labour practice dispute was set down for hearing in the Bargaining Council on 4 June 2011. However, on 1 June 2011, a settlement agreement was concluded between Mr Putini, represented by his attorney, and the Council, represented by a certain Mr MNS Makhoba ("Mr Makhoba"), in terms of which the Municipality agreed to pay Mr Putini an amount of R3.5 million "in full and final settlement of any and all matter arising from the suspension". The suspension was formally uplifted in terms of this agreement.

[16] Mr Putini brought an application to enforce the "settlement agreement" in the Kwa Zulu Natal High Court. The Municipality, by way of counter-application, sought an order setting aside the settlement agreement on the grounds of unlawfulness, as Mr Makoba (its duly authorised representative) was only authorised to enter into a settlement agreement in relation to the upliftment of Mr Putini's suspension and his reinstatement. In other words, Mr Makhoba was not authorised to enter into any agreement to pay the sum of R3.5 million or any amount to Mr Putini as part of the settlement agreement.

[17] As it turned out, Mr Makhoba was a junior officer in the housing office. Accordingly, the High Court found that the settlement agreement had not been

properly authorised and dismissed the application.[1] Mr Putini applied for leave to appeal against this decision. Leave to appeal was refused by both the High Court and the Supreme Court of Appeal.

[18] The argument advanced by the Municipality in the High Court was that as a previous head of the administration, Mr Putini would have been aware that specific authority was required and that it was clear from its resolution, of 31 May 2011, that it was never its intention that he should be paid R3.5 million. In short, the Municipality contended that Mr Putini had abused the lack of knowledge of Mr Makhoba, whom he was aware was a housing clerk.[2] Consequent upon Mr Putini's purported misconduct in relation to the settlement agreement, the Municipality suspended Mr Putini on new charges of misconduct on 21 June 2011.

[19] Mr Putini's fixed-term contract of employment was, however, due to expire on 31 December 2011. In the circumstances, the Municipality was advised by the Provincial Government that it would serve little purpose in commencing a disciplinary enquiry that would not likely be completed before the end of Mr Putini's term of employment. Consequently, on 24 August 2011, the Municipality and Mr Putini concluded an agreement terminating his employment contract by mutual consent. It was agreed that Mr Putini would be paid out for the unexpired portion of the contract and was in fact paid out.

[20] This notwithstanding, Mr Putini challenged the consensual termination of his employment contract by lodging an unfair dismissal claim with the Bargaining Council, This claim was dismissed on the grounds that his termination of employment was consensual.[3]

[21] Having suffered this defeat, and the earlier one in the High Court relating to the enforcement of the R3.5 million settlement, Mr Putini then sought to revive the

[1] *Thabo Putini v Endumbe Municipality* Case No. 11700/2011, 15 May 2012 (KwaZulu Natal High Court, Durban ("the *High Court case"*).
[2] The *High Court case* at para 9.
[3] Exhibit C: Award by Prof K Govender, 16 November 2012

unfair labour practice dispute concerning his alleged unfair suspension which he had referred to the Bargaining Council, three years earlier, on 12 January 2011.

[22] At the arbitration, the Municipality led evidence to show that Mr Putini was suspended for reasons set out in an undated "Caucus Complaints" document which raised allegations of serious misconduct against him. The allegations against Mr Putini included mismanagement of funds, nepotism, the irregular appointment of staff, gross dereliction of duty, absenteeism, unauthorised wasteful expenditure and poor revenue management. In addition, it was alleged that the Municipality's accounting systems were in disarray; the Auditor-General was regularly issuing disclaimers in respect of the Municipality's financial statement and it was not far from being placed under administration. As the Municipality's accounting officer, Mr Putini was considered to be responsible for this state of affairs.

[23] However, Mr Mbhekiseni Mncube ("Mr Mncube"), who was the Speaker of Council at the time of Mr Putini's suspension, testified that Caucus Complaint document was a party (Inkhata Freedom Party) caucus document and was not in existence at the time that the Council took the decision to suspend Mr Putini.

[24] Mr Sipho Thomas Mthethwa ("Mr Mthethwa"), the acting Mayor at the time of Mr Putini's suspension, testified that although he was aware of the document, he could not say how or when it was made. He said that the complaints against Mr Putini came from members of the community and were brought to the attention of councillors who were divided according to their political persuasion.

In the Arbitration Hearing

[25] The arbitrator heard the unfair labour practice dispute in January 2014. The arbitrator found that the suspension was both substantively and procedurally unfair and he ordered the Municipality to pay Mr Putini compensation in the sum of R480, 305.43, being an amount equal to nine months' remuneration at Mr

Putini's rate of pay. He also ordered the Municipality to pay costs on the highest magistrates' court scale on a party and party basis.

[26] During the arbitration proceedings, the Municipality's representative had attempted to cross-examine Mr Putini on the merits of the allegations or "complaints" as set out in the "Caucus Complaints document. Mr Putini's representative objected to the cross-examination. The objection was upheld and the arbitrator consequently disallowed any evidence that was intended to prove that Mr Putini was guilty of the misconduct allegations set out in that document. In arriving at this conclusion, he reasoned as follows:

> 'On 29 January 2014 I ruled that whereas the Bargaining Council should be cautious in preventing evidentiary material from being presented, bearing in mind that what may appear irrelevant at first may turn out to be relevant at a later stage, the Bargaining Council should, at the same time, be alive to what the issues are and be loath to allow evidence that that is not relevant to the issues to be determined. I ruled that all questions that sought to inquire into whether Mr Putini was guilty of the allegations recorded in the caucus document of the IFP were not relevant to the issue that the Bargaining Council was required to determine in this dispute. Whether or not Mr Putini was guilty of those allegations was not the centre of the case to be determined. Therefore in cross-examining Putini, the representative of the employer was not to traverse in detail whether or not Putini as guilty of the allegations contained in the caucus complaints documents.

[27] Having heard the evidence, the arbitrator found that the suspension was both procedurally and substantively unfair. In relation to the substantive unfairness of the suspension, the arbitrator found that:

> 'The caucus complaints document was a political discussion document. It was not disclosed to the employee. Mncube accepted during cross-examination that the caucus complaints document did not allege that the employee had committed misconduct. According to Mncube, when Kheswa [the Mayor] and Makhoba returned from seeing the IFP attorney in Durban towards the end of November

> 2010, the complaints document had not come into existence. It appears that the document would have been created between 9 December 2010 and 4 January 2011 when it was presented to the forensic investigators, not at the time of the suspension of the employee. The disclaimers that the Municipality was getting from the auditor-general were ongoing. They did not commence when the employee became municipal manager. The employee's evidence that he had implemented a turnaround strategy was not gainsaid. Mncube conceded that there was no justifiable reason to suspend the employee.
>
> The Bargaining Council is not required to decide the motive for the suspension of the employee. Therefore, in passing, it seems that the new political power wanted to purge the municipality of both the officials and politicians deemed not loyal to the new order. Putini was perceived to be Hlatshwayo's boy. On Mthethwa's evidence it seemed that the employee was suspended because he did not accept instructions from politicians.'

[28] In relation to compensation, the arbitrator found that the unfair suspension had effectively damaged Mr Putini's reputation and awarded him compensation in the sum of R480 305.43 which was equivalent to nine months of Mr Putini's remuneration.

In the Labour Court

[29] Aggrieved, the Municipality instituted review proceedings against the decision of the arbitrator to not allow its legal representative to cross-examine Mr Putini on whether he was guilty of the misconduct allegations set out in the Caucus Complaints document and by extension the KPMG report. It contended that this constituted a gross irregularity in the proceedings. It also challenged the excessive nature of the compensation that the arbitrator awarded as being grossly irregular. In addition, it contended that the evidence to prove that Mr Putini was guilty of the underlying allegations was also relevant to whether Mr Putini was entitled to compensation, and if so what amount.

[30] In relation to the KPMG investigation report, the Labour Court held as follows:

'The investigation was conducted by the auditors…and a report was subsequently filed. If the [Municipality] had conducted a disciplinary hearing one would be better placed to understand the seriousness of the misconduct because then…[t]here would be allegations levelled against [Mr Putini] and evidence would be led at the hearing. He would be given a chance to challenge it, he would give his own evidence and out of that process one would then have a foundation to understand the circumstances under which he was suspended. In the absence of that disciplinary hearing… it clearly followed that any evidence about the forensic report became inadmissible.

What the [Municipality] sought to do in this case was to eat the cake and still have it. It is the [Municipality] that decided not to charge [Mr Putini] with misconduct up until he left the employment and when it was then left with no clear indications that would support the reason for charging him, it sought to rely on the report itself. As I have indicated already, this report was not of a final nature and it was not definitive. It was a report constructed without conducting an interview with [Mr Putini].

When one looks at the evidence of some of the witnesses that testified, even at the arbitration, one begins to wonder whether it was safe to even look at this report. I think it is a Mr Mncube who said in his evidence that there appeared to have been no justifiable reason for the suspension of [Mr Putini]. This is a witness that was called by the [Municipality] who gave such favourable evidence in favour of [Mr Putini]. In my findings today, the ruling by the [arbitrator] was not a misdirection. It was a very reasonable decision that he made. It can therefore not be faulted.'

[31] In relation to the compensation that the arbitrator awarded to Mr Putini, the Labour Court observed:[4]

'I may at this stage comment by end remark that I just read what motivated the suspension in this case as on the date of suspension. I have indicated that clearly there were no clearly defined acts of misconduct. We have politicians that sat in [C]ouncil and discussed and decided to effect a suspension, but when it came to

its implementation, there clearly were no facts to substantiate such a suspension…

That is why and one can understand it, the applicant seeks to vindicate itself by reliance on the auditor's report. This is a case where the commissioner in issuing an award identified some of the salient considerations that he took into consideration when he looked at the appropriate compensatory amount. This he said in paragraph 55 [of the arbitration award] which reads thus:

"Taking into account among other things the fact that the employee employment terminated in August 2011, he was on suspension for nine months, the fact that the employer was suspended with full pay the suspension was unfair both substantively and procedurally. The decision to suspend the employee was taken while he was on sick leave. The employee was not found guilty of any misconduct as well as the fact that Keswa treated the employee in a demeaning way. The Bargaining Council deems that compensation equivalent to nine months of the employee's salary is appropriate compensation."

This is an award where the [arbitrator] evinces through the award what considerations he took into account when awarding this nine month's compensation. It clearly was following the guide as has been shown in the cases I have referred to [namely *ARB Electrical Wholesal (Pty) Ltd v Hibbert*[5] and *Minister of Justice and Constitutional Development and Another v Tshishonga*[6]].

In my view, the [arbitrator] conducted a proper inquiry that he was called upon by the office he held. In my view the [arbitrator] issued an award and premised it on a decision which I believe a reasonable decision-maker could have reached under the circumstances. That being the case I conclude this application for the review of the arbitration award in this matter is not meritorious.'

[32] The Labour Court accordingly dismissed the review application with costs. The appeal against the order of the Labour Court is with leave of this Court.

[5] 2015 (11) BLLR 1081 (LAC).
[6] 2009 (9) BLLR 862 (LAC).

In the Appeal

[33] In the appeal, the Municipality argues that in preventing its counsel from leading evidence that was admissible and material on the question of whether Mr Putini was guilty of the underlying allegations set out in the Caucus Complaints document (and by extension the KPMG report), the arbitrator committed a gross irregularity which prevented a fair trial of the issues that he was required to decide.

[34] The Municipality furthermore argues that having disallowed it from leading evidence that was admissible and material, the arbitrator made findings adverse to it, on matters to which the excluded evidence was relevant, in particular, the findings that Mr Putini's suspension was substantively fair; that his reputation was impaired by the suspension, and that he was entitled to a compensation award just three months shy of the maximum permissible in terms of section 194(4) of the LRA. It submits that these findings would not have been sustainable had the Municipality been allowed to lead evidence to prove that Mr Putini was guilty of the allegations that had precipitated his suspension. It, accordingly, submits that evidentiary material pertaining to the merits of the underlying allegations was clearly relevant and that the Arbitrator's conduct in excluding such material, amounted to a gross irregularity as contemplated in section 145(2)(a)(ii) of the LRA.

[35] It is a trite principle of law that for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. [7] It is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator "must not misconceive the inquiry or undertake the inquiry in a misconceived manner", as this would not lead to a fair trial of the issues. Mere errors in the law and fact as well as other process related errors are not sufficient to show that the arbitrator

[7] *Herholdt v Nedbank* [2012] BLLR 1074 (SCA).

misconceived the inquiry. It must be shown that "the arbitrator undertook the wrong enquiry, undertook the enquiry in a wrong manner" or "arrived at a decision which no reasonable decision-maker could reach on all the material that was before him or her". [8]

[36] It is submitted on behalf of Mr Putini that it was neither unreasonable nor a misconception of the inquiry for the arbitrator to disallow the Municipality from cross-examining Mr Putini and leading evidence which tended to show that he was guilty of the allegations contained in the Caucus Complaints' document because that was not the issue for determination. That is, so it contended, because in establishing the fairness of the suspension, the employer is not required to prove that the employee is guilty of the allegations of misconduct that formed the basis for the suspension. I agree.

[37] The arbitrator identified the issues relevant to the substantive fairness of Mr Putini's suspension as follows:

> 'The employer may suspend the employee on full pay if he is alleged to have committed a serious offence and the employer believes his presence at the workplace might jeopardize any investigation into the alleged misconduct or endanger the well-being or safety of any person or municipal property."
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> The threshold for the substantive fairness of the suspension is very low. All that is required is that at the time of suspending an employee there must be allegations that an employee has committed serious offence/s and the employer must reasonably believe that the employee's presence at the workplace might jeopardize the investigation or endanger the well-being or safety of any person or property.'

[38] It is clear from this that the arbitrator did not misconstrue the issues for determination. Thus in reviewing the award, the Labour Court correctly found no fault with the arbitrator's reasoning. This is because an employer is not required to prove the guilt of an employee in an unfair labour practice dispute concerning

[8] *Head of Department of Education v Mofokeng* (2015) 36 ILJ 2802 (LAC) at paras 30-33.

the question of whether an employee's suspension in procedurally and substantively fair. The employer is only required show that at the time of suspending the employee there were allegations that he or she had committed serious offence/s and the employer reasonably believed that the employee's presence at the workplace might jeopardize the investigation or endanger the well-being or safety of any person or property.[9] The Municipality's legal representative conceded this during the exchange between him and the arbitrator during the arbitration proceedings:

> 'COMMISSIONER: The question then is what would be appropriate in the circumstances where the suspension is found to be unfair but I do not believe that it extends to considering the question whether the employee was guilty or not. That is not before us.
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> ADVOCATE CRAMPTON: Ja, I agree
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> …
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> ADVOCATE CRAMPTON Firstly at the outset, I can say that I agree with my learned friend that at this enquiry we are not required to determine whether or not Mr Putini was guilty of the allegations that were referred to in the KPMG report so that is not why we are leading that evidence.'

[39] As I understand it, the Municipality's argument on appeal conflates the substantive fairness of dismissal with the substantive fairness of Mr Putini's suspension. It is the subsequent disciplinary hearing that will determine whether or not an employee is guilty of misconduct allegations. The Municipality was contractually obliged to institute disciplinary proceedings against Mr Putini within 60 days of his suspension. However, on its own admission, the Municipality did not institute disciplinary proceedings against Mr Putini to answer to misconduct charges following receipt of the KPMG report because the Municipality's managers who were, at the time, responsible to act on the findings of the KPMG investigation, failed to do so.

[9] *Mogotlhe v Premier North West Province* (2009) 30 ILJ 524 (LC) at para 39.

[40] Likewise, after suspending Mr Putini for the second time, due to his involvement in seeking to enforce a R3.5 million settlement which was not authorised by the Municipality, it again elected not to institute disciplinary proceedings against him. This time, because his fixed-term contract was due to expire on 31 December 2011, and a disciplinary enquiry was not likely to be completed before the end of his term of employment.

[41] In addition, neither the Caucus Complaints document nor the KPMG forensic investigation report which the Municipality sought to rely on in proving Mr Putini's guilt were in existence at the time that the Municipality suspended him. The Municipality led the evidence of Mr Mncube. He was the Speaker of Council during the time of Mr Putini's suspension. He was pertinently asked in cross-examination about the undated Caucus Complaints document which the Council purportedly relied upon in resolving to suspend Mr Putini pursuant to clause 14.1 of his employment contract. Mr Mncube said that these allegations were not in existence at the time of Mr Putini's suspension. In the same vein, Mr Mkhize testified that he recognised the Caucus Complaint's document but did not know how or when it was compiled.

[42] In relation to the KPMG report, the Municipality commissioned it from KPMG subsequent to suspending Mr Putini. The testimony of the Municipality's legal advisor, Mr William Lawrence, reveals that the KPMG report was a preliminary report on some of the misconduct allegations contained in the "Complaints Document" that were purportedly considered by the Council. The KPMG report was, however, only compiled more than four months after the suspension on 4 May 2012. This was before the investigators even had an opportunity to interview Mr Putini or consult with Council.

[43] It is clear from the evidence led on behalf of the Municipality, at the arbitration proceedings, that it was not denied the opportunity to lead evidence on the gravity or seriousness of any misconduct allegations against Mr Putini that existed at the time of his suspension, and formed the justification for the

Council's resolution to suspend him in terms of clause 14.1 of his employment contract.

[44] The evidence presented at the arbitration proceedings sustains the reasonableness of the arbitrator's conclusion that Mr Putini's suspension was substantively unfair. Significantly, the Municipality does not take issues with the following findings of the arbitrator in relation to the procedural and substantive fairness of Mr Putini's suspension.

> '(a) At no time did the employer notify the employee in writing of the reasons for his suspension.'
>
> '(b) The employee was not informed why his presence in the workplace was not desirable.'
>
> '(c) …Mncube accepted during cross-examination that the caucus complaints document did not allege that the employee committed misconduct …It appeared that the document would have been created between 9 December 2010 and 4 January 2011 when it was presented to the forensic investigation, not at the time of the suspension of the employee Mncube conceded that there was no justifiable reason to suspend the employee.'

[45] I consider the arbitrator to have correctly found that the misconduct allegations were not in existence at the time that Mr Putini was suspended. Mr Mncube conceded this in his testimony. This finding is not challenged on appeal. It would have been unreasonable, to my mind, for the arbitrator to have allowed the Municipality to lead evidence and to cross-examine Mr Putini on the contents of the Caucus Complaints document and the KPMG report in order to prove that he was guilty of allegations of misconduct when that was not the issue for determination before him. Moreover, the evidence led by the Municipality made it plain that these documents did not exist at the time of the suspension. The issues for determination in relation to the substantive fairness of the suspension concerned the existence or otherwise of serious allegations of misconduct

against Mr Putini at the time of his suspension, and whether the employer reasonably believed that his presence at the workplace might jeopardize the investigation or endanger the well-being or safety of any person or property. Hence neither the Caucus Complaints' document nor the KPMG report was material and relevant to whether Mr Putini's suspension by the Municipality was substantively fair.

[46] The Municipality persists in its contention that the arbitrator did not admit the Caucus Complaints' document into evidence. This is not true as it is clear from the record that the arbitrator admitted this document into evidence and that counsel for the Municipality cross-examined Mr Putuni extensively on its contents in order to establish the gravity of the so-called misconduct allegations against him at the time of his suspension. Both Mr Mncube and Mthethwa testified on the contents of the document on behalf of the Municipality.

[47] It is also disingenuous for the Municipality to contend that the arbitrator made a finding that Mr Putini was not guilty of the misconduct allegations against him. The arbitrator was, in my view, very circumspect in relation to the issues for determination before him. He specifically and painstakingly refrained from venturing into whether or not Mr Putini was guilty of the allegations of misconduct against him. Accordingly, the arbitrator did not misconceive the nature of the inquiry before him.

[48] For these reasons, I conclude that the Labour Court did not err in concluding that the arbitrator's decision, that the Municipality's suspension of Mr Putini was procedurally and substantively unfair, is one that a reasonable decision-maker could have reached.

Quantum of Compensation

[49] The Municipality argues that quantum of compensation awarded to Mr Putini by the arbitrator is so excessive that the award is not one that could have been made by a reasonable decision-maker. The issue for determination in relation to

the challenge to the arbitrator's award of compensation is whether the award of nine months' compensation was just and equitable in the circumstances?

[50] The remedies available to an employee who has suffered an unfair labour practice are provided for in s193(4) read with 194(4) of the LRA. Section 193(4) confers an arbitrator with the power to determine any unfair labour practice dispute referred to him or her on terms which the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation. Section 194(4) in turn provides that the compensation awarded to an employee in respect of an unfair labour practice dispute must be just and equitable in all the circumstances, but not more than the equivalent of 12 month's remuneration.

[51] The power of a court of review to interfere with the quantum of compensation awarded by an arbitrator under s194(4) of the LRA is circumscribed and can only be interfered with on the narrow grounds that the arbitrator exercised his discretion capriciously, or upon the wrong principle, or with bias, or without reason or that he adopted a wrong approach or has misconducted himself on the facts or reached a decision in which the result could not reasonably have been made by an arbitrator directing himself to all the relevant facts and principles. In the absence of one of these grounds, a court has no power to interfere with the quantum of compensation awarded by the arbitrator. The court cannot interfere simply because it would come to a different decision.[10]

[52] The Labour Court applied the *Sidumo*[11] (reasonableness test) to its review of the arbitrator's compensation award which was made in terms of section 194(4) of the LRA. This was the wrong test. The correct test was to inquire whether the arbitrator in awarding compensation in the amount of R480 305.43 exercised his discretion capriciously, or upon the wrong principle, or with bias, or without reason or that he adopted a wrong approach. Consequent upon this misdirection, this Court is at large to reconsider the quantum of the compensation award of the arbitrator.

[10] *Kemp* at paras 21 and 55.
[11] *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

[53] It must be recalled that one of the contentions advanced by the Municipality in relation to the quantum of compensation awarded to Mr Putini, is that the evidence to prove that he was guilty of the underlying misconduct allegations was also relevant to the question of whether he was entitled to compensation and, if so, in what amount. And that in disallowing the admission of that evidence, the arbitrator committed a misdirection.

[54] I agree that evidence from any subsequent disciplinary proceedings in which the employee was found guilty of misconduct allegations, that formed the basis for his suspension, would be relevant to the question of whether an employee should be awarded compensation as a result of being unfairly suspended by his or her employer, and if so in what amount. However, in a dispute such as the current one, where the employer did not institute disciplinary proceedings against the employee, it would be prejudicial to the employee for the arbitrator to allow the employer to cross-examine the employee - not on evidence that has established his guilt- but on evidence that only tends to do so. This would defeat a core objective of the LRA which is to give effect to the right of employees to fair labour practices.

[55] The arbitrator, in my view, did not commit a misdirection in exercising his discretion against allowing the Municipality from cross-examining Mr Putini on evidence that sought to establish his guilt as that evidence was not relevant and material to the question of the quantum of compensation to be awarded.

[56] Turning then to the question of whether the quantum of compensation awarded by the arbitrator was appropriate. This Court has repeatedly held that factors to be taken into account in determining the quantum of compensation include the following:

> '…the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or

distress, the abuse of the relationship between the parties, and the attitude of the defendant after the iniuria had taken place…'.[12]

[57] The factors to be taken into account are, however, not limited to those stated above. The award of compensation must be just and equitable having regard to all the relevant factors.[13] Undue weight should not be given to factors that favour one party only. In other words, the compensation granted must be fair and just to both the employee and the employer.

[58] In *Kemp,* this Court held that all relevant factors must be taken into account in awarding compensation to the employee. Despite finding the dismissal of the employee to be both substantively and procedurally unfair on appeal, in *Kemp* this Court set aside the award of compensation because the dismissed employee refused to accept "a genuine and reasonable offer of reinstatement made to her by the employer". It is, therefore, not only the employer's attitude and conduct subsequent to a suspension or dismissal which must be taken into account in determining the quantum of compensation to be awarded to the wronged employee, but so too must the employee's conduct.

[59] In reviewing the compensation award of the arbitrator, the Labour Court failed to recognise that the arbitrator did not take into account all the relevant factors. It simply rubberstamped the factors that the arbitrator took into account that favoured granting an excessive compensation award to the employee, and completely disregarded the factors that pointed to the contrary.

[60] In doing so, the Labour Court ignored the following relevant factors: on being informed of his suspension, Mr Putini did not request an opportunity to make representations but instead, in a letter dated 1 December 2010, stated that he would "accept suspension". Although this does not mean that the employee waived his right to challenge his suspension, this is factor that the Labour Court ought to have taken into account in evaluating whether the compensation

[12] *Minister of Justice and Constitutional Development and Another v Tshishonga* (2009) 30 ILJ 1799 (LAC) at para 18; *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC) at para 24
[13] *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ (LAC).

awarded by the arbitrator was appropriate as it indicates that Mr Putini could not have suffered any meaningful injury if he did not, in the first place, intend to contest his suspension.

[61] In terms of clause 14.3 of Mr Putini's employment contract, if he is suspended as a precautionary measure, then the Municipality must hold a disciplinary hearing within 60 days, failing which the suspension terminates and Mr Putini is obliged to return to work. It is common cause that the Municipality did not hold a disciplinary hearing within the required sixty-day period and the suspension was terminated on 31 January 2011. Mr Putini was obliged to return to full duty. The onus was on Mr Putini to return to work or at least tender his services. He did not do this.

[62] As is clear from Mr Putini's testimony, he was well aware of clause 14.3 and he even alerted his attorneys, at the time, to its provisions. This notwithstanding, there is no evidence that Mr Putini tendered his services after his suspension had terminated by operation of clause 14.3 of his employment contract. Nor is there evidence that either Mr Putini or his attorneys had brought it to the attention of the Municipality that his suspension had terminated and that Mr Putini was, therefore, entitled and obliged to return to work.

[63] It follows from this that Mr Putini would be as much to blame as the Municipality for not returning to work following the termination of his suspension by operation of clause 14.3 of his employment contract. Although to his credit, Mr Putini had, by that stage, already referred an unfair labour practice dispute to the Bargaining Council in which he claimed the upliftment of his suspension and maximum compensation.

[64] A further factor which the Labour Court failed to consider in its review of the compensation award was Mr Putini's involvement in the R3.5 million putative settlement. Following the change in the political control of the Council, a settlement agreement was signed in respect of Mr Putini's unfair labour practice dispute which was pending in the Bargaining Council. The Council had resolved

to uplift the suspension with immediate effect and proposed that a settlement agreement be signed with him. The agreement was signed by Mr Putini's attorneys and by Mr Makhoba, the Council's duly authorised representative.

[65] In terms of the agreement, which was ultimately set aside by the High Court on 15 May 2012 for lack of authorisation by the Council, the Municipality purportedly agreed to pay Mr Putini the sum of R3.5 million in full and final settlement. Subsequent to the setting aside of this agreement and on 21 June 2011, the Municipality suspended Mr Putini for alleged misconduct in "associating himself with and, indeed attempting to enforce the unconscionable agreement" which it did not authorise.

[66] Mr Putini's fixed-term contract was due to expire on 31 December 2011. The Municipality was advised that it would serve little purpose in commencing a disciplinary enquiry that would likely not be completed before the end of his term of employment. It, therefore, concluded an agreement with Mr Putini terminating his employment contract by mutual consent. He was paid out for the unexpired portion of his contract.

[67] Predictably, Mr Putini disputed this agreement and referred an unfair dismissal dispute to the Bargaining Council, which was dismissed on the basis that Mr Putini had agreed to the termination of his contract of employment. This was a further factor which the arbitrator failed to take into account in exercising its discretion in favour of granting Mr Putini compensation in the amount of R480 305.43. The award of the arbitrator (Prof. K. Govender) in the unfair dismissal proceedings was before the arbitrator in the unfair labour practice dispute. It was also before the Labour Court in the review application.

[68] Although the award was subject to a pending review at the time of the review application, it is clear from the evidence led there that:

> 'When asked by [the arbitrator] whether he would approve this amount had he been the municipal manager, he replied somewhat evasively, that he would have

attempted to renegotiate and reduce the amount. When he was pressed for a response, he indicated that he would have signed off on this settlement agreement.'

[69] Despite being cautioned by the Municipality that the settlement agreement was in principle unlawful because the Council had not authorised Mr Makhoba to enter into any agreement to pay him R3.5 million or any sum of money in damages, Mr Putini sought to enforce the agreement in the High Court. Unsurprisingly, the High Court set it aside.

[70] That Mr Putini was prepared to endorse and bind the Municipality to a settlement agreement of this nature, certainly calls into question his judgment and motive for not abandoning the putative agreement in favour of the Council uplifting his suspension in accordance with its resolution, of 31 May 2011, to do so.

[71] Mr Putini's conduct in relation to the settlement agreement, and his subsequent attempt to enforce it is, to my mind, not above reproach. Mr Putini was the Municipality's manager at the time. This obliged him to prevent fruitless and wasteful expenditure. Given that the maximum compensation he would have been entitled to receive, in terms of section 194(4) of the LRA, for an unfair labour practice was R750 000, it is inconceivable that any payment of R3.5 million to Mr Putini could be anything other than fruitless and wasteful expenditure.

[72] In his evidence in the arbitration proceedings, Mr Putini testified that he should be compensated for certain hardships that can be attributed to the settlement that was concluded on 1 June 2011 with the Municipality. He persisted in the contention that in terms of the settlement agreement he would have been entitled to receive a payment of R3.5 million from the Municipality.

[73] Moreover, despite the finding by the High Court that Mr Makhoba was not authorised by the Council to enter into a settlement agreement for payment of R3.5 million to Mr Putini, he doggedly insisted, under cross-examination in the

arbitration proceedings, that Mr Makhoba was authorised to enter into the settlement agreement. Mr Putini maintained this version in spite of the fact that the settlement was set aside by the High Court, and leave to appeal was refused by both the High Court and the Supreme Court of Appeal. At best for Mr Putini, his conduct reveals a reckless attitude toward public monies and a complete lack of remorse for the role that he played in seeking to enforce an unauthorised and unconscionable settlement agreement.

[74] All in all, any difficulties or hardships that Mr Putini experienced after 31 May 2011, can only be attributed to his involvement in the R3.5 million settlement that he sought to enforce knowing full well that it was not authorised by the Council. As is apparent from the Council resolution of 31 May 2011, his suspension would have been lifted with immediate effect. However, but for associating himself with the unconscionable settlement agreement, the Municipality would not have suspended Mr Putini on 21 June 2011 for his alleged misconduct in relation thereto.

[75] It is clear from this that Mr Putini must take equal responsibility for his suspension between 31 May 2011 and the mutual termination of his employment contract on 24 August 2011 which dragged out his suspension by a further three months.

[76] Had the Labour Court applied the correct test in reviewing the quantum of the arbitrator's compensation award, it would have had regard to the full conspectus of the evidence on the record, from which it is plain that the compensation which the arbitrator awarded to Mr Putini was excessive and inappropriate.

[77] This notwithstanding, I am of the view that Mr Putini is entitled to some measure of compensation as, on the Municipality's own version, there was no justifiable reason for his suspension on 1 December 2010 as the motive was political. In addition, he was treated in a demeaning manner by the Mayor and was humiliated and embarrassed amongst his colleagues and subordinates in the workplace. His reputation was also impaired as a result of negative reports in the

press. In the circumstances, I consider it just and equitable to award Mr Putini compensation in the amount of R120 00.00.

Costs

[78] The Municipality has only achieved partial success in the appeal. To this end, I consider it fair and just not to award it costs in the appeal. On account of the same result in the review application and the arbitration, I adopt the same approach to the order of costs there.

Order

[79] In the result, I order that:

1. The appeal is partially upheld with no order as to costs.

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

‘(i) The suspension of Mr Thabo Putini was procedurally and substantively unfair and constituted an unfair labour practice in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995.

(ii) The Endumbe Municipality is ordered to pay Mr Putini the sum of R120 000.

(iii) Payment of the amount referred to in paragraph (ii) above shall be paid into the trust account of Mr Putini’s attorneys of record within fourteen days of the date of this order.

(iv) There is no order as to costs.

(v) Both parties to the dispute shall jointly pay the Bargaining Council's fees and those incidental thereto amounting to R4000.00 for the fourth day of the arbitration.'

3. There is no order as to costs in the review application.

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F Kathree-Setiloane

Acting Judge of Appeal

I agree

_____

B Waglay

Judge President of Appeal

I agree

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CJ Musi

Judge of Appeal

APPEARANCES

FOR THE APPELLANT: Mr DP Crampton

Instructed by: PKX Attorneys

FOR THE RESPONDENT: Mr B Magaga

Instructed by: Garlicke & Bousefield Inc