REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case: JR 2262/12

In the matter between:

DEPARTMENT OF LABOUR **Applicant**

and

THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **First Respondent**

M M BALOYI **Second Responded**

JOHN DE KLERK **Third Responded**

Heard: 10 July 2014

Delivered: 19 December 2014

Summary: Review application in terms of section 145, Arbitration award decided on paper, where the information was not before the Arbitrator that cannot be the ground for review, Review application dismissed.

JUDGEMENT

RALEFATANE AJ

Introduction

[1] This is a review application in terms of section 145 of the LRA[1], seeking to set aside an arbitration award issued by the Second Respondent on 30 July 2012 under case reference number GPSBC 1699/12.

Background details

[2] The Third Respondent is a Senior Admin Officer of the Applicant. The Third Respondent was charged with misconduct alleging that on 01 November 2011 he attended work while under the influence of alcohol.

[3] Following the allegations levelled against the Third Respondent, the Applicant charged him with such misconduct on the 08 December 2011, the disciplinary hearing of which was set and heard on 19 December 2011.

The sanctions subsequent to the disciplinary hearing

[4] On the 21 December 2011, the Third Respondent received two letters conveying the two different sanctions.

The first letter read as follows:

> 'Dear Mr J de Klerk
>
> Final Written Warning in terms of the Disciplinary
>
> After careful consideration of the Presiding Officer's finding and recommendations, I have decided in terms of the provisions of paragraphs 7.4(a) (iii), of the Public Service Co-ordinating Bargaining Council Resolution No.1 of 2003 (Disciplinary Code and Procedures for the Public Service), to issue you with a FINAL WRITTEN WARNING. Should you engage in further similar transgressions within the next six (6) months, this warning may be taken into account, which may lead to your discharge from the Public Service.
>
> The FINAL WRITTEN WARNING will be place on your personal file and will remain valid for a period of six (6) months from the date of this letter. After six (6) months the warning will be removed from your file.

[1] Labour Relations Act, 1995 (Act 66 of 1995)

You have the right in terms of clause 8 .2 of the Public Service Coordinating Bargaining Council Resolution No.1 of 2003, to the Department Appeals Authority against this decision.

Should you exercise your right to appeal, you must submit your written appeal within 5 working days of receipt of this letter, for the attention of: Ms T Roos, Appeals Authority Secretariat, Department of Labour, Private Bag X117, Pretoria, 001 or fax to (012) 309 4594'.

[5] After receiving this letter, the Third Respondent received the second letter which reads as thus:

'Dear Mr J de Klerk

Two Months Suspension without pay in terms of the Disciplinary Code.

After careful consideration of the presiding Officer's findings and recommendation, I have decided in terms of the provisions of paragraphs 7.4 (a) (IV) of the Public Service Co-ordinating Bargaining Council Resolution No 1 of 2003 (Disciplinary Code and Procedures for the Public Service), to issue you with a TWO MONTHS SUPENSION WITHOUT PAY. Should you engage in further similar transgression this sanction may be taken into account, which may lead to your discharge from the Public Service.

You have the right in terms of clause 8.2 of the Public Service Coordination Bargaining Council Resolution No 1 of 2003, to appeal to the Departmental Appeals Authority against this decision.

Should you exercise your right to appeal, you must submit your written appeal within 5 day of receipt of this letter, for the attention of: Ms T Roos Appeal Authority Secretariat, Department of Labour , Private Bag X 117 ,Pretoria 001or fax to (012) 309 4594'.

[6] These two letters are the source of the issue in that the Third Respondent questions the logic behind issuing two letters communicating two different sanctions. The first letter communicates the "final written warning'' as a sanction for the misconduct and the second letter communicates "two months' suspension without pay'' as the second sanction for the same misconduct.

[7] The letters were both dated the 21 December 2011. Based on these two letters communicating two different sanctions for the same misconduct, the Third Respondent lodged an appeal which was dismissed on the 6 February 2012.

[8] The Third Respondent declared a dispute of unfair labour practice with the GPSSBS ("Council") the referral of which is dated the 18 April 2012. The conciliation failed, thereafter the Third Respondent requested the dispute to be arbitrated. The request for arbitration form is dated the 30 May 2012. The arbitration hearing was heard by the Second Respondent in his capacity as an arbitrator on the 19 July 2012 where upon the arbitration award was issued on the 30 July 2012.

[9] The arbitration award was in favour of the Third Respondent ordering the Applicant to pay him (the Third Respondent) R32 000, 00 (Thirty Two Thousand Rand) being the amount lost in salaries during the suspension period.

[10] The Applicant therefore applied to this Court for the review and setting aside of the said arbitration award issued under case number GPBC 1699/12.

Grounds for review

[11] *Afrox Healthcare Ltd v CCMA and Others*[2]*, Gaga v Anglo Platinum Ltd and Others*[3]*, and Herholdt v Nedbank Ltd*[4]*: CCMA*[5] awards can be reviewed on the grounds stipulated in s145 of the LRA[6] and in addition, on the ground of unreasonableness. Section 145 of the LRA provides as thus:

> '(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply the Labour Court for an order setting aside the arbitration award –
>
> (a) …
>
> (b) …

[2] (2012) 33 *ILJ* 1381 (LAC); [2012] 7 BLLR 649 (LAC).
[3] (2012) 33 *ILJ* 329 (LAC); [2012] 3 BLLR 285 (LAC).
[4] (2012) 33 *ILJ* 1789 (LAC).
[5] Commission for Conciliation, Mediation, and Arbitration
[6] Act 66 of 1995

(2) A defect referred to in subsection (1), means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) …'

[12] The Applicant applied for review and setting aside of the arbitration award on the following grounds:

12.1 The Second Respondent ignored evidence presented before him at the arbitration hearing therefore committing gross irregularities;

12.2 The Second Respondent incorrectly interpreted the evidence presented at the arbitration hearing therefore reached erroneous conclusion that any reasonable commissioner could not have made;

12.3 That Applicant failed to apply his mind and therefore committing gross irregularity.

Issues allegedly misinterpreted

Pronouncement

[13] The Third Respondent stated that the chairperson of the disciplinary hearing is the one who must arrive at a decision after evaluating and analysing the evidence before him but in this case Tina Roos of the Applicant pronounced. The chairperson of the disciplinary hearing, Mr Vusi Mtshwane, should have been the one who made the pronouncement not Tina Roos as in this case. This procedure is in terms of PSCBC Resolution[7] which provides that:

[7] PSCBC Resolution No 2 of 1999 as amended by Resolution No 1 of 2003 clause 7.3 m and O

> 'if the chairperson decides the employee has committed misconduct, the chairperson must inform the employee of the finding and the reasons for it …The chairperson must communicate the final outcome of the hearing to the employee within 5 working days after the conclusion of the disciplinary enquiry…''.

[14] It is the Third Respondent's submission that in his case, the chairperson of the disciplinary hearing did not inform him of the finding and reasons instead Tina Roos did which is in violation of the Resolution. Further that the chairperson did not communicate the final outcome of the disciplinary hearing of the Third Respondent as required by the same Resolution. The outcome was communicated to the Third Respondent by Tina Roos instead of the chairperson.

[15] The Applicant submits that it is common practice that the employer would normally communicate the decision of the chairperson to the accused hence Tina Roos communicated such decision to the Third Respondent. It is the Third Respondent's uncontested averment that this explanation was not presented before the arbitration hearing.

[16] In order to assess whether the decision–maker has committed irregularities or reached an unreasonable decision, consideration must be given to what was before him or her at the time. The unreasonableness of the decision is assessed on the basis of all the relevant material facts before the decision-maker and nothing outside that. The unreasonableness stems from the situation where all the relevant information was presented and the arbitrator considered such but nonetheless arrives at unreasonable conclusion. In order to determine whether the decision is unreasonable, the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[8] test is applied where the question at para 110 was asked:

> 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'

[8] (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC)

[17] The question whether or not the information was before the decision–maker and the decision–maker erred in applying his/her mind to the material facts presented or elected not to take such into consideration is valid and the two differ. The difference is that the material facts can be before the decision-maker but he or she fails to apply his mind therefore reaching unreasonable decision. This does not denote that the decision-maker has ignored the material facts presented. It simply means that the material facts were taken into account but failing properly to apply the mind therefore resulting in unreasonable decision.

[18] The other relates to a situation where the decision-maker ignored the material facts presented before him or her. In this situation the question of unreasonableness does not arise rather the issue of irregularity is likely to be the case. There is a difference between the decision-maker ignoring the material facts before him or her and the decision-maker failing to apply his or her mind to the material facts resulting in unreasonable decision which when assessing the material facts presented, the inference is that a reasonable decision-maker would not have reached such a decision.

[19] The review criterion is whether the decision is rationally linked to the material facts before the decision-maker and the reasons given for it. See the case of *Carephone (Pty) Ltd v Marcus N.O and Others*[9]. Proper consideration of all relevant material facts and issues is crucial to arrive at reasonable decision and if decision–maker fails to consider all relevant factors which he or she is bound to consider, the outcome decision will not be reasonable in the dialectical[10] sense. Likewise, where an arbitrator does not apply his or her mind to the issues served, in the circumstances the decision will not sustain reasonableness.

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[9] (1998) 19 *ILJ* 1425 (LAC); [1998] 11 BLLR 1093 (LAC) at para 37

[10] *Afrox Healthcare, Gaga, and Herholdt:* CCMA awards can be reviewed on the grounds stipulated in s145 of the LRA and in addition, on the ground of unreasonableness. In these trilogy judgments types of reviews were discussed. According to the trilogy judgments there are two types of reviews-result-based (dialectical) and process-based reviews (which concerns itself with the procedure followed by the decision-maker in arriving at the result or the outcome).
Similarly, there are two types of unreasonableness-substantive unreasonableness (relating to result) and dialectical unreasonableness (relating to the process). The test for substantive unreasonableness is the *Sidumo* test. See also *Fidelity Cash Management Service v CCMA and Other*s (2008) 3 BLLR 197 (LAC).

[20] In this case the parties elected not to present oral evidence but rather decided that the arbitrator should consider the matter on paper and arrive at the decision. The risk with this approach is that where material facts are not well explained on paper, the fault cannot be attributed to the arbitrator further that it provides very little chances of succeeding, if any, in review. The advantage of presenting oral evidence before the decision-maker is that explanations can be given where necessary and clarity questions asked and answered. However, even if the parties chose that the matter be heard on paper, they should do their best to provide as much information as possible including explanations to make matters clearer. The Applicant is unable to show that explanation was given to the arbitrator that in practice they have been deviating from the provision of the Resolution[11] which required that the chairperson is the one who should pass the pronouncement.

[21] A further analysis is of essence in this issue in order to put it in perspective. To start the analysis the question is: had these material facts been before the arbitrator, would he or she have reached a different conclusion? If the answer is in the negative, then it is futile to easily grant a review especially when it is apparent that the decision is not going to be different. We are talking about deviation from the Resolution which is a collective agreement. Deviation from the agreement without consensus of the parties thereto will remain invalid unless there is a permitting clause. Undermining of the collective agreements or policies shall not be encouraged or easily condoned as that will leave these governing documents purposeless and not protective to the powerless parties like employees. Listening to the explanation as provided by the Applicant, it is this Court's view that there is no reasonable explanation for deviation from the Resolution (collective agreement)[12]. Before this Court, the issue is neither there nor here as the explanation by the Applicant pertaining to the reason for deviation is not persuasive to can say that the decision would have been different, had the arbitrator being presented with such explanation.

[22] The Resolution is clear that the chairperson must pronounce and communicate the final outcome of the disciplinary hearing. In this case, Tina

[11] GPSBC Resolution at footnote 2 *supra*
[12] Footnote 2 *supra*

Roos *"carefully considered"*[13] whereupon she pronounced and communicated the final outcome which is evidentially repugnant to the provisions of the Resolution[14].

[23] The fact that the Applicant adopted its own procedure and making it a practice resulting in deviation from the Resolution was not explained to the arbitrator in that premise, it would be unfair to arrive at a conclusion that the arbitrator failed to apply his mind or ignored the material facts that were never before him. Policies exist for a reason, they are binding to parties, deviation from the policies is to undermine other parties who are expected to observe and adhere to such policies with the attachment that failure to observe and adhere to such has the consequences of disciplinary actions being taken.

[24] Policies are negotiated and enacted to govern the workplace whereby employer and employee are equally bound by them which means that there should be no superior parties who can arbitrarily or unilaterally decide not to adhere to the policies when the situation suits them. A negotiated policy like this Resolution, which was negotiated by the employer and labour, cannot be arbitrarily or unilaterally changed by a mere practice, without it being renegotiated to either amend or deviate from it. As much as the employee is expected to adhere to company policies, the employer is equally so and even to act in such a way that it leads by example. It will defeat the purpose of establishing policies (which is to maintain order and governance within the workplace) if employers by virtue of their perceived superiority are permitted to deviate from the rule that they have discretionarily established and adopted.

[25] The arbitrator interpreted the Resolution correctly in the absence of any explanation being advanced as to the reason for not following the procedures by the book. A consideration of all material relevant facts is fundamental to a reasonable decision see *Afrox Healthcare Ltd v CCMA and Others*[15], *Gaga v Anglo Platinum Mines Ltd and Others*[16], and *Herholdt v Nedbank Ltd*[17] but

[13] See para 4 & 5 *supra*
[14] See footnote 2 & 4
[15] (2012) 33 *ILJ* 1381 (LAC); [2012] 7 BLLR 649 (LAC)
[16] (2012) 33 *ILJ* 329 (LAC); [2012] 3 BLLR 285 (LAC)

where the information was not presented before the arbitrator, it cannot be said that the arbitrator reached unreasonable decision attributing that to the information that was not presented, or even attempting to say that the arbitrator failed to apply his or her mind. In the premise, this Court finds no valid reason to conclude that the arbitrator was unreasonable or that he failed to apply his mind.

[26] Another issue relates to the two letters issued and signed by Tina Roos stating the two different sanctions. The two letters were both dated the 21 December 2011. The Third Respondent avers that the Applicant first issued the letter communicating "final written warning*"* as a sanction but he was surprised to receive the second letter communicating the sanction of "2 months suspension without pay" for the same misconduct. Both letters were signed by Tina Roos.

[27] It is the Third Respondent's submission that the decision concerning the sanctions was made by Tina Roos and not the chairperson of the disciplinary hearing as required by the Resolution. Further that the Applicant issued the sanction of the final written warning and thereafter changed its mind and issued a severe sanction of 'two months suspension without pay'. The Third Respondent stated that it was incorrect for the Applicant to have passed two different sanctions for the same misconduct.

[28] The Applicant submitted that Tina Roos did not decide on any sanction but rather just communicated to the Third Respondent what the disciplinary chairperson has decided. Further that the disciplinary chairperson did pass the two sanctions which is in line with clause 7.4 (a)(iv) of the Resolution[18] providing the following:

> '…sanction consist of
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> i. counselling;
>
> ii. A written warning valid for six months;
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> iii. A final written warning valid for six months;
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> iv. A suspension without pay, for no longer than three months;

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[17] (2012) 23 *ILJ* 1789 (LAC)

[18] PSCBC Resolution No 2 of 1999 as amended by Resolution No 1 of 2003

v. Combination of the above; or

vi. Dismissal'.

[29] Clause 7.4 (a) (VI) provides that a combination of sanctions may be imposed for the same misconduct which means that there is no irregularity on the issue of imposing two sanctions for the same misconduct in this regard.

[30] The Third Respondent avers that the Applicant first imposed final written warning as a sanction and later changed its mind and imposed the second sanction of 'two months suspension without pay' which is more severe. In order to determine, whether or not the Applicant imposed the Second sanction because it had changed its mind, it will be important to examine the two sanctions letters.

In *Nampak Corrugated Wadeville v Khoza*[19] it was held that:

> 'The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable…'.

[31] In the court's view, interference with the imposed sanction by the employer is only justified where the sanction is unfair or the employer acted unfairly in imposing the sanction to such that the said sanction is so harsh as to shock the precincts of fairness. In such a case, the commissioner has the duty to interfere. In casu, the Applicant issued a sanction of 'final written warning' and later issued additional sanction of 'two months suspension without pay'. The latter sanction is so excessive that it can destruct the essence of fairness.

[32] The imposition of the sanction is largely within the employer's prerogative but the fairness thereof is not.

[19] [1999] 2 BLLR 108 (LAC); (1999) 20 *ILJ* 578 (LAC) at para 33.

In *Country Fair Foods (Pty) Ltd v CCMA and Others*[20] Dictum by the court was the following:

> '…Commissioners must approach the functions with caution…commissioners must exercise greater caution when they consider the fairness of the sanction imposed by an employer…'

[33] The question is: reading the letters would the reader clearly understand and tell that the letters where meant to invoke clause 7.4 (a) (VI) of the Resolution? If that was the intention, whether the message of the two letters is clear that the two sanctions go together? Putting it other way round, whether or not a reader will take that the letters are independent from each other or the last letter supersedes the first one. Reading the letters there is nowhere in both of them where the reader is informed that the two letters augment each other. There is no explanation as to the rationally behind issuing two letters signed by the same person communicating two different sanctions and given to the Third Respondent at different times. What is more confusing is that the Third Respondent did not receive the two letters at one time but rather given to him in piece meal. If it was the intention of the Applicant to issue two letters with different sanctions it would have been understandable to give the two letters simultaneously to the Third Respondent with an explanation.

[34] In its application before this Court, the Applicant explains the reason for issuing two letters with two different sanctions. It is noteworthy that the reasons where neither furnished to the Third Respondent before nor the arbitrator. However, the reasons the Applicant is submitting before this Court are as follows: Tina Roos was occupying two positions at the time of the incident. She was Director of Employment Relations and at the same period she was appointed Acting Chief Director for Human Resource Management with effect from 12 December 2011 to 30 December 2011. The appointment letter was submitted as part of the material before this court.

[35] In terms of the Resolution[21], 'two months suspension without pay' for an employee who is between salary levels 1-12 must be communicated by senior

[20] [1999] 11 BLLR 1117 (LAC); (1999) 20 *ILJ* 1701 (LAC) at para 28.

Executive Manager / Human Resource Management/ Provincial Manager/ Commissioners. According to the Applicant's explanation the letter with 'two months suspension without pay' was in accordance with this provision which required to be issued by senior Executive Manager: Human Resource Management/ Provincial Manager/ Commissioners and Tina Roos signed this letter in her capacity as such.

[36] The 'final written warning valid for six months' sanction needed to be communicated by commissioners in the final/Provincial Managers/ Executive Manager; Employment Relations. Tina Roos issued this letter in the capacity of her other position.

[37] The question to be determined is whether the arbitrator was presented with this explanation. According to the Third Respondent this explanation was not before the arbitrator at the time and this submission was not denied. The two letters do not make reference of each other or making reference to the clause that the Applicant alleges it envisaged to invoke. It follows inconceivably that the arbitrator failed to apply his mind to the information or explanation that was unknown to him when making the decision. It was the Applicant's duty to submit all the relevant material to the arbitrator. There is no convincing submission that the arbitrator misinterpreted the information in this regard.

[38] The Third Respondent further submitted that Tina Roos took the decision in regard to the two sanctions. The Applicant holds that Tina Roos was merely communicating the decision of the disciplinary chairperson. The contents of the letters read as follows:

38.1 The first letter:

> '**After careful consideration of the presiding officer's findings and recommendations**, I have decided in terms of …to issue you with a final written warning …' (the court's emphasis).

38.2 The second letter states that:

> '**After careful consideration of the presiding officer's findings and recommendations**, I have decided in terms of… to issue you with a two months suspension without pay …' (court's emphasis).

[21] PSCBC Resolution No 2 of 1999 as amended by Resolution No 1 of 2003 clause 7.4 (b),

[39] The extracts from the two letters as quoted communicate a different understanding from the Applicant's explanation. The circumstances surrounding these two letters all support the Third Respondent's allegation of unfairness.

[40] It is clearly mentioned in both letters that Tina Roos was just not conveying the decision of the disciplinary chairperson but rather 'carefully considered the presiding officer's findings and recommendations'

[41] The understanding is that the presiding officer recommended but not taken the final decision. The essence of the message conveyed by the two letters is that Tina Roos is the one who took the final decision because the disciplinary chairperson has just made recommendations which are subject to confirmation, rejection, or amendment. John Grogan in his Workplace Law [22] states that:

> 'Sometimes disciplinary codes provide that the presiding officer make a 'recommendation' to a higher level of authority, who accept or rejects the recommendation'

[42] Recommendations are not binding until the other person takes the final decision based on such recommendations and further that the said person may decide not to follow such recommendations. There was no need for Tina Roos to "carefully consider*"* if she was merely conveying the final decision of the chairperson. From the letters it is invariably believable that she is indeed the one who took the decision and not the chairperson. Even if the chairperson of the disciplinary hearing envisaged these two sanctions, both the Applicant's letters purport that the chairperson just recommended the sanctions over which Tina Roos exercised her discretion to reach the final decision. The arbitrator's findings in this regard are well within the understanding of a reasonable decision–maker and he has reached a decision that a reasonable decision-maker, under the circumstances, would have.

[22] John Grogan: Workplace Law tenth edition at para 2 page 245

[43] The Third Respondent did not receive the outcome of the disciplinary proceedings until at the arbitration hearing; which means that the Third Respondent was not in possession of the said outcome during the appeal process nevertheless the findings of the appeal hearing are that all procedural and substantive requirements were met. One will fail to conceive as to how can the procedural requirements even thought to have been met when the outcome of the disciplinary hearing was not available to the Appellant. The Applicant does not contest the fact that the Third Respondent had the outcome of the disciplinary hearing for the first time at the arbitration proceedings. The arbitrator was correct in his findings pertaining to this issue.

[44] To this court's view, having regard to the reasoning of the arbitrator, based on the material facts presented before him, it cannot be said that his conclusion was one that a reasonable decision- maker could not reach.

[45] After considering the relevant information in this matter it is ordered as follows:

i. That the application to review the arbitration award issued by the Second Respondent dated 30 July 2012 is hereby dismissed;
ii. That the application to set aside the Second Respondent's arbitration award dated 30 July 2012 is hereby dismissed;
iii. Further that the Applicant is ordered to bear the cost of this application.

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RALEFATANE AJ

Acting Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant:	Advocate Chauke
Instructed by:	The State Attorney in Pretoria
For the Third Respondent:	Advocate F Van der Merwe
Instructed by:	Bowens Inc. Attorneys