

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: JR627/06

In the matter between:

Gauteng Enterprise Propeller

Applicant

And

Senior Jabulani Mbatha

1st Respondent

The Commissioner for Conciliation

Mediation and Arbitration

2nd Respondent

Ntombekhaya S. Mancotywa N.O.

3rd Respondent

JUDGMENT

1. This is an application to review and set aside the arbitration award issued by the third respondent in which she found the dismissal of the first respondent procedurally and substantively unfair and ordered his reinstatement.
2. The applicant is a company duly incorporated in terms of Section 21 of the Company Law of the Republic of South Africa. The first respondent, Mr. Mbatha was employed by the applicant as an industrial advisor. The contract under which Mr. Mbatha was employed was signed on 20 June 2001. His employment commenced on 1 August 2001.

3. Mr. Mbatha's main duties as set out in the contract of employment were to:

- (a) To design and cost effectively manage a wide variety of multi-discipline engineering/ manufacturing projects from conception to completion.
- (b) To assist clients (SMME's) with the required managerial, technical, financial advice to stimulate the development of suitable enterprise.
- (c) To help entrepreneurs' to help themselves by solving business problems with them.
- (d) To function as back-up resources for the cadet officers, actually involving themselves in problem related to management and operation of the client's company.
- (e) Responsible for ensuring those personnel working in projects comply with relevant legislation and safe working practices.
- (f) Interface with and register / develop service providers.
- (g) Inputs for the continual update of SMME and service provider database.
- (h) Set-up / arrange business linkages seminars to promote networking and co-operation amongst SMME's.

4. He was charged with three counts of misconduct being dishonesty and or fraud and or forgery. A disciplinary hearing presided over by an outside chairperson was held. Mr. Mbatha was found guilty and dismissed on 8 December 2004. Mr. Mbatha referred a dispute to the second respondent. The third respondent presides over the arbitration hearing and issued an award dated 9 February 2006 which the applicant is challenging.

5. The applicant has challenged the award on four grounds namely that :

The commissioner exceeded her powers by ordering 13 months compensation;

The commissioner committed a gross irregularity in the proceedings in the manner in which she dealt with the agreement reached by the parties on 2 December 2005 regarding the evidence of Mr. Martin.

The commissioner's finding that the dismissal was procedurally unfair is not rationally connected to the evidentiary material properly before her. Her finding that the applicant disregarded their disciplinary code by appointing outsiders to chair the disciplinary hearing ignored the evidence that the code served merely as a guide and did not contain peremptory provisions.

The commissioner's finding that the dismissal was substantively unfair is not rationally connected to her own reasons or to the evidentiary material properly before her. She failed to properly consider the seriousness of the misconduct perpetrated by the first respondent.

6. During the arbitration hearing, the evidence of the applicant was led by its chief executive officer Mr. Phore. Mr. Martin who was instrumental in the charges did not give evidence. The parties agreed that his statement would go in as evidence. Mr. Phore's evidence was that the applicant was set up to assist Small Medium Micro Enterprises in establishing their business. Industrial advisors are employed to assist and examine the status of SMME's in ascertaining constraints that would impede the full participation of the SMME's. The assistance is through service providers who are on the applicant's data base. These service providers are then contracted to the applicant to assist the SMME's in return for a management fee. The industrial advisors recommend which service provider would do the work.
7. Mr. Phore further testified that in 2003, Mr. Martin made a complaint to the respondent's chairperson alleging that he paid a management fee to Mr. Mbatha for services he had rendered to him. Mr. Martin stated that he was not aware that he had to pay the management fee. Mr. Phore testified that Mr. Mbatha invoiced Mr. Martin for services that were paid for by the applicant. The services that Mr. Mbatha rendered to Mr. Martin were within the scope of the applicant and for this reason, there was conflict of

interest. The actions of Mr. Mbatha were in direct conflict with his contract of employment.

8. Mr. Dan Mogami also testified and corroborated Mr. Phore. Another witness was Mr. P.S. Morolo who testified that some of the applicant's services included the designing, setting up, as well as the implementation of websites.
9. Mr. Mbatha's evidence was mainly that in March 2003 he received a message from the receptionist to call Mrs. Martin. He called her and she told him that she was referred to him by a person from the department of labour. Her family wanted to recruit field workers for their internet business. He offered to assist the Martins in getting premises and advising them on how to go about setting up their business. He testified that this service did not fall under the scope and mandate of the applicant because Mr. Martin did not at the time have a business and was not a manufacturing company. The Martins did not have employees at the time. He received money from the Martins some of which were for personal use and had nothing to do with the applicant. He further testified that the Martins became service providers for the applicant after he had severed all business ties with him. He further stated that the applicant did not comply with its own disciplinary code pertaining to who should preside over the disciplinary hearings.
10. I now turn to the grounds of review. I have mentioned in paragraph 3 of this judgment what Mr. Mbatha's duties were. I however wish to firstly deal with the first ground of review relating to the order for payment of the loss of salary equal to thirteen months. Mr. Van Der Riet for the applicant submitted that the commissioner exceeded his powers in ordering compensation of 13 months. Mr. Mbatha submitted that the amount

awarded was a back pay and not compensation. For this reason as Mr. Mbatha submitted that the limit of 12 months does not apply.

11. I agree with the applicant's submission that the commissioner exceeded his powers. In *CWIU and others v Latex Surgical Products (Pty) Ltd* (2006) 2 BLLR 142 (LAC) at Para 116 Zondo JP stated:

“In the light of all the above , I conclude that it is not competent to order a retrospective operation of a reinstatement order (even if limited) which is in excess of twelve months in an ordinarily unfair dismissal case.”

12. I should point out that the commissioner ordered reinstatement in this matter without loss of benefit and income and also ordered payment of R373750-00 which is the amount equal to 13 months. The *Latex* judgment has since confirmed that even the back pay has to be limited to 12 months. It would be unreasonable to limit the period of retrospective reinstatement to 12 months but allow the back pay to exceed the 12 months limit. This ground of review should therefore succeed. The commissioner should have limited the back pay to 12 months. This ground alone, is not sufficient to have the award reviewed in toto as I am entitled to correct it.

13. Mr. Van der Riet further submitted that the commissioner committed gross irregularity in dealing with Mr. Martin's statement. It is common cause that Mr. Martin failed to attend the arbitration hearing. It is further common cause that the parties agreed that Mr. Martin's statement would go in as evidence. The commissioner questioned Mr. Mbatha if he was aware of the implications for the admission of the statement of Mr Martin. At page 45 of the transcript lines 1-7 the commissioner stated:

“...because I make the ruling that we are going to proceed. We are going to proceed without Mr. Martin and the parties agree. Mr. Mbatha you have been cautioned and advised accordingly as to the implications of what you want me to do and you understood that perfectly. I am proceeding

with Mr. Martin and the evidence that shall be led pertaining to Mr. Martin shall only be confined on the statements made by Mr. Martin before the disciplinary hearing and after the disciplinary hearing...”

14. In dealing with the statement of Mr. Martin the commissioner reasoned that:

“Mr Phore’s testimony was based on Mr. Martin’s statement. Considering the fact that Mr. Martin failed to attend this arbitration, I shall thereby attach to such evidence the weight it deserve.”

15. The commissioner completely ignored Mr. Martin’s statement. The basis for this appears to be that Mr. Martin did not testify. The applicant should have been advised that Mr. Martin’s statement would not be taken into account if he did not testify. The commissioner’s reasoning does not tally with the warnings he gave to Mr. Mbatha regarding the implications of admitting Mr. Martin’s statement. In my judgment the commissioner committed a gross irregularity when ignoring Mr. Martin’s statement where the parties had agreed to have it used as evidence in circumstances where a clear warning had been given to the parties of the implications of admitting it. That left the applicant with the belief that the statement would be given effect to. What is also strange is that the commissioner stated that she would attach to the statement the weight it deserved. It is not clear what the commissioner meant. This is so because she failed to go further and indicate what weight she had attached to it in coming to her conclusion. Mr Mbatha submitted that Mr. Martin’s statement was rejected because of contradictions. This does not appear as the reason for rejecting it. The commissioner did not rely on contradictions. I therefore reject this submission made by Mr. Mbatha. It is my view that the applicant was not given a fair hearing. I find the commissioner’s conduct unfair and grossly irregular when dealing with Mr. Martin’s statement. The award stands to be reviewed and set aside on this ground.

16. Another issue I need to deal with is the finding of procedural unfairness of the dismissal. In this regard, the commissioner reasoned that:

“The Respondent’s disciplinary procedure clearly states the procedure to be followed when disciplinary action is taken against an employee as well as the persons authorised to take such disciplinary action... No explanation or justifying reasons were afforded by Mr. Phore on why the respondent decided to disregard its own disciplinary procedure. It had been put in place for a reason. I am having difficulty in understanding the respondent’s actions on this aspect. I am compelled to believe that in this instance the respondent deliberately disregarded its disciplinary procedure to suit its own interests. It is therefore my opinion that respondent’s failure to observe its own disciplinary procedural constituted procedural unfairness.”

17. This reasoning was based on the fact that the applicant used an external Chairperson of the disciplinary hearing instead of the internal one in accordance with the company’s disciplinary code.

18. It was submitted that the code is only a guide and that there was no unfairness in the use of the external presiding officer. It was further submitted that there was no prejudice to Mr. Mbatha. Mr. Mbatha submitted that the disciplinary procedure is part of the employment contract and therefore the applicant had to comply with it. He submitted that the violation of the disciplinary procedure was unfair.

19. In *Highveld District Council v CCMA & Others* (2003) 23 ILJ 517 (LAC) at p520 para 15, the Court held that :

“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 S188 (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.”

20. Applying this principle, I do not think that the mere fact that the applicant used the presiding officer who was not in the management constituted unfairness. In the *Highveld* judgment at p521 B-H, Du Plessis AJA stated :

“... 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... The respondent was nevertheless informed of all the allegations against him before the disciplinary hearing commenced... The respondent was confronted with all the evidence against him during the disciplinary hearing and he had ample opportunity to dispute every piece of evidence that was put before the disciplinary committee. It is on that evidence that he was, correctly as it turned out, found guilty of misconduct.”

21. In *Khula Enterprise Finance Ltd v Madinane & Others* (2004) 4 BLLR 366 (LC), the employer appointed an independent advocate to chair the disciplinary hearing. In this regard, Kennedy AJ at p369 F-H, stated that :

“The arbitrator does not appear to have considered at all the reason why an independent advocate was appointed to chair the enquiry. There were several reasons for doing so, in particular that the most senior level of management were personally involved in the complaints and the allegations against Dr Madinane and it was simple unrealistic to appoint somebody within management... The code serving merely as a guideline, the employer was entitled to look outside the organisation for somebody with appropriate expertise and objectively to chair the enquiry. This served the interests of both sides in this regard. His reliance on the provisions of the code was misplaced. It did not provide that an employee had to approve the appointment of any person to chair the disciplinary enquiry. It merely provided that enquires would ordinarily be chaired by a member of management, the level of which ‘would be acceptable to both parties.’”

22. In the light of the fact that the present matter is not different from the *Khula* matter, I cannot find any reason for the commissioner to find that the dismissal was unfair because the procedure set out in the code was not followed. I can only conclude that the commissioner did not apply her mind and failed to have regard to the current jurisprudence.
23. In *Rand Water Board v CCMA* (2005) 26 ILJ 2028 (LC) at 2032 Nkabinde AJ found that it would be highly technical and wrong to regard technical procedural defect as constituting procedural unfairness in the absence of any loss or prejudice suffered as a result thereof. Similarly in *Dube & Others v Nasionale Sweisware (Pty) Ltd* (1998) 19 ILJ 1033 (SCA) the Court held that the company's disciplinary code and standard disciplinary procedural provisions contained therein are not obligatory. I agree with this view and therefore conclude that the commissioner did not apply his mind in coming to the conclusion that the dismissal was procedurally unfair. In the result, the award can not stand.
24. In the light of what I have found, there is no need for me to deal with other grounds of review raised by the applicant. The record is messy and it is difficult for me to make a proper assessment of the evidence on other issues. It is therefore my considered view to remit the matter back to the CCMA. I am fully aware that this will cause a further delay in the matter. It is fair to both parties that I do not decide the merits on insufficient evidence. The proper thing to do is to have the dispute arbitrated afresh.
25. I have considered the question of costs. In this matter, in the light of the fact that I was not asked to make a cost order, I have decided that there should be no order for costs.
26. The order I make is the following:
- (a) The award is reviewed and set aside.

- (b) The dispute is remitted to the first respondent for arbitration by another commissioner.
- (c) There is no order for costs.

NGCAMU AJ

Date of Hearing: 12 December 2006

Date of Judgment: 05 February 2007

For the Applicant: Adv. J.G. Van der Riet SC instructed by Ruth
Edmonds Attorneys

For the 1st Respondent: Mr Mbatha (in person).