IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: JR 2378/03

In the matter between:

CLINIX PRIVATE HOSPITAL SOWETO (PTY) LTD Applicant

and

WILLIE RALEFETA First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

GRACE LESABA Third Respondent

JUDGMENT

REVELAS AJ

[1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995, as amended ("the Act"). The applicant seeks herein to review an award in terms of which it was found that the dismissal of Grace K Lesaba ("the third respondent") by the applicant was both procedurally and substantively unfair, and she was reinstated. The main ground of review is that the first respondent ("the arbitrator") in making the award, did not apply his mind to the evidence before him and his conclusion (that the dismissal was unfair and ordering reinstatement) was irrational.

[2] The following facts gave rise to this review application:

[3] The third respondent was involved in an incident with the applicant's acting hospital manager Ms Petra Swanepoel on 21 February 2003. The third respondent was subsequently charged with insubordination and insolence. The case of the applicant against the third respondent was more particularly that she had -

- ❖ failed to adhere to an instruction from Ms Swanepoel to report to her office to discuss a complaint by another employee;
- ❖ after reporting to Ms Swanepoel, failed to adhere to instructions from Ms Swanepoel to stop shouting and to give an explanation;
- ❖ directed abusive and crude language to Ms Swanepoel;
- ❖ refused to leave Ms Swanepoel's office despite repeated requests to do so;
- ❖ showed contempt by refusing to accept a notice to attend a disciplinary hearing and throwing the said notice back at Ms Swanepoel.

[4] At the disciplinary hearing the third respondent pleaded guilty and presented her case in mitigation. Because the applicant believed

that the trust relationship between the parties had been destroyed, dismissal was imposed as the only appropriate sanction in the circumstances. The third respondent had also expressed her written satisfaction with the fairness of the disciplinary procedure. On 28 March 2002, the third respondent referred a dispute about the substantive fairness of the dismissal to the second respondent ("the CCMA"). This resulted in a default award in favour of the third respondent which was ultimately rescinded.

[5] The applicant (or "the hospital") relied on the testimonies of four witnesses. They were Petra Swanepoel, Rose Koehle, Lesley Clark and Jabu Gumede. The third respondent called no witnesses and testified on her own behalf.

[6] Ms Swanepoel gave evidence that as the acting hospital manager, she was responsible for maintaining discipline an order in the hospital. Whenever she assumed her position as acting hospital manager, a memorandum to that effect would be circulated in the hospital. When she was not acting as hospital manager, her position was that of Nursing Services Manager and even in that position, in charge of the nursing staff. She testified that on the day in question, Mr Jabu Gumede had told her of threats made by the third respondent against him.

[7] According to Ms Swanepoel, the security guard, Mr Gumede, had complained to her that he was accosted by the third respondent who had threatened to kill him and called him an impimpi (zulu for

snitch), apparently because she had believed he was responsible for the dismissal of a certain gardener. She then sent the hospital secretary, Ms Lesley Clark to fetch the third respondent. Ms Clark returned to advise that the third respondent had disputed Ms Swanepoel's authority and refused to come, because she was not a nurse (she was an administrative official). However, the third respondent did come into her office a little while later, and began shouting at Mr Gumede who had remained in her office. According to Ms Swanepoel, the third respondent refused to sit down and discuss the matter, despite requests to do so and waved her arms wildly continuing to shout at Mr Gumede. When Ms swanepoel decided that the third respondent was out of control, she requested the third respondent to leave her office and held the door open for this purpose. She said she had to ask the third respondent to leave three times before she adhered to the request. When she gave the third respondent a notice to attend the disciplinary hearing, she did not sign to acknowledge acceptance of the document and threw it back at Ms Swanepoel, ordering her to put it in her file.

[8] The third respondent denied that she acted as described by Ms Swanepoel and said that before she could respond to any allegation, she was shown the door by Ms Swanepoel. It is very significant that the third respondent had pleaded guilty to insolence and insubordination at the disciplinary hearing whereas she denied guilt at the arbitration hearing. The arbitrator clearly did not apply his mind to this clear indication that the third respondent's version was probably false. Her version is also improbable in the

circumstances. Ms Swanepoel's version was corroborated in all material respects by Ms Clark, who testified that the third respondent had also yelled at her in the hospital's administrative section, in front of all the staff. Mr Gumede, who was asked to leave Ms Swanepoel's office at some stage, also corroborated Ms Swanepoel's evidence.

[9] Ms Rose Khoele who was also part of the hospital's managerial staff, testified to the fact that during December 2002 (2 months prior to the incident in question) there was an incident which had the result that the third respondent was given a final written warning which the third respondent had signed. During cross-examination Ms Khoele was probed about the authenticity of the third respondent's signature on the written warning. She answered that she was not a handwriting expert. Despite her clear evidence that the third respondent had signed the written warning in her presence, and in the presence of two witnesses, the arbitrator drew an adverse inference from her answer without weighing up the probabilities and her evidence in its entirety, as he was duty bound to do. The arbitrator did not do that with regard to any of the applicant's witnesses. He selected from their evidence only that which favoured the third respondent. This approach can be followed right through his award.

[10] The arbitrator also did not apply his mind to the fact that the third respondent had signed a document (at the disciplinary hearing) to the effect that although she thought the dismissal to be unfair, she

regarded the procedure followed as fair. When she referred her dispute to the CCMA, she referred a dispute only about substantive unfairness and not procedural unfairness. In the proceedings where she obtained a default award in her favour, procedural fairness was also not raised. The record of those proceedings was before the arbitrator. He nonetheless found procedural unfairness.

[11] The arbitrator was also completely wrong in considering that Matron Swanepoel only acted as hospital manger for a short while, when she called the third respondent to her office. It is also hardly likely that the third respondent had not read the memorandum referred to in the testimony of Ms Swanepoel. She testified that the third respondent had always sought her permission to leave early and acknowledged her authority in other ways too. Be that as it may, no employee should behaved as the third respondent had done. The arbitrator misdirected himself by second-guessing Ms Swanepoel's authority at the time. There are numerous instances of incorrect findings by the arbitrator and examples of false testimony led by the third respondent. I do not intend to list them all. Yet, some warrant mention. They are the following:

[12] The arbitrator found that Ms Rose Khoele conceded that one Nomvula (the third respondent's representative at the hearing) asked for a postponement of the case because she was not familiar with the case, and when the chairperson refused the application, Nomvula then "recused herself". That is wrong as such facts were not attested to by Khoele. The arbitrator also came to the finding

that Ms Khoele "agreed that the final written warning was written after the disciplinary hearing was conducted". Ms Khoele never conceded that. It was the applicant's case that a final wriiten warning for insubordination was given to the third respondent during January 2003 and thus preceded the disciplinary enquiry that resulted in the third respondent's dismissal.

[13] In his reasoning the arbitrator found that Ms Swanepoel testified that the "the applicant was asked to look for a representative just before the disciplinary hearing started". This was not Ms Swanepoel's testimony. The arbitrator also stated that it was Ms Swanepoel's evidence that one Nomvula (the third respondent's representative during the disciplinary enquiry) asked for a postponement, which was not the case. The arbitrator in his award referred to pages 7 and 14 of the CCMA's bundle of documents in support of this alleged request for a postponement, but the two pages contain no reference to any request for a postponement and relates to entirely different and unrelated issues.

[14] The arbitrator stated in his award that Ms Swanepoel testified that the third respondent left her office after she (Ms Swanepoel) opened the door and told her to leave. This was not the testimony of Ms Swanepoel who clearly testified that it was only after repeated requests for the third respondent to leave that she did so. It was furthermore not Ms Swanepoel's testimony that the third respondent had said that "she was not a nurse and that she could not understand why Petra (Ms Swanepoel) wanted to see her" as was held by the arbitrator. The evidence of Ms Swanepoel was that the third respondent had told Ms Clark that she did not have to report to Ms Swanepoel because she was not a nurse.

[15] In his award, dealing with Ms Swanepoel's cross-examination, the

arbitrator concluded that "the witness (Petra) denied that the applicant did not lodge an appeal against her dismissal". What the arbitrator accordingly found was that Ms Swanepoel conceded that the third respondent had appealed against the finding of the chairperson. The arbitrator held that, "the witness (Petra) explained that the Hospital Manager refused to accept the appeal written by the applicant and gave it to the driver to send back". This was not Ms Swanepoel's evidence. On the contrary, Ms Swanepoel testified that the third respondent did not appeal against the outcome of the disciplinary enquiry.

[16] The arbitrator's findings on what transpired during Ms Clark's cross-examination were also wrong. It was not Ms Clark's evidence that the third respondent "immediately followed her to Ms Swanepoel's office". She testified that the third respondent started shouting when she (Ms Clark) suggested to the third respondent that she should rather report to Ms Swanepoel's office. The third respondent in fact only reported later. Ms Clark also did not testify that the third respondent "regretted" anything, as found by the arbitrator.

[17] In his analysis of Mr Gumede's evidence during cross-examination, the arbitrator found that Mr Gumede had "agreed that he did not attend the disciplinary hearing despite the fact that he started the dispute by reporting the applicant (the third respondent) to the matron". Mr Gumede never conceded this, and the arbitrator's conclusion in this regard is incorrect. The third

respondent's version was never put to any of the applicant's witnesses and the arbitrator failed to consider this important omission on the part of the third respondent.

[18] The arbitrator's reasoning in this case was not rationally coonected to the evidence before him. In upholding the third respondent's version of events, the arbitrator in effect found that the applicant's four witnesses had conspired to lie, without any proof thereof whatsoever. On the clear probabilities their version is true ant the third respondent had been untruthful at the arbitration hearing. That fact alone has destroyed the trust relationship. The applicant's disciplinary code was also before the arbitrator. In terms of the code and the final written warning, the applicant was entitled to dismiss the third respondent.

[19] The arbitrator should have rejected the version of the third respondent. Given the final written warning for a similar offence and the hospital's disciplinary code, the arbitrator should have found that the hospital had a fair reason to dismiss the third respondent, particularly since she had given false evidence at the arbitration hearing. It is in any event not permissible for arbitrators to interfere with an employer's sanction of choice, unless there are extremely compelling reasons to do so. This was the firm view of his Lordship, Mr Justice Edwin Cameron, with the unanimous concurrence of his colleagues who presided with him in the Supreme Court of Appeal, in the matter of *Rustenburg Platinum Mines Ltd v The CCMA and others. (*Case number 598/05, dated 26

September 2006).

[20] The award clearly falls to be set aside and substituted with one to the effect that the dismissal was fair. The manner in which the third respondent had conducted herself at the arbitration hearing by presenting a false version, is reason enough to make an order that she should pay the costs of this application.

[21] I therefore make the following order:

1. The award of the third respondent is hereby set aside and substituted with the following:

> "The dismissal of the third respondent was for a fair reason and a fair procedure was followed in dismissing her".

2. The third respondent is to pay the costs of this application.

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E Revelas
Acting Judge of the Labour Court

Date of hearing: 24 October 2006
Date of judgment: 10 January 2007

On behalf of the Applicant:

Adv. FA Boda, instructed by Friedland Hart Incorporated.

On behalf of the Third Respondent:

Mr I Baloyi of A Phutiane Phefadu Attorneys _____