IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR 3271/06

In the matter between:

TSHWANE UNIVERSITY OF TECHNOLOGY	APPLICANT
AND	
COMMISSIONER P H KIRSTEIN	1ST RESPONDENT
R MASON	**2ND** RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is a review of a private arbitration in terms of section 33 of the Arbitration Act 42 of 1965 (the Act). In terms of the award the first respondent (the arbitrator) found the dismissal sanction imposed on the second respondent (the respondent) to have been too harsh. It was for that reason that he ordered the respondent to be reinstated with a warning valid for nine months. The application was opposed by the respondent.

Backgrounds facts

[2] The respondent was prior to his dismissal employed as Deputy Registrar: Academis Administration.

[3] After his dismissal the respondent lodged an appeal against the decision of the disciplinary enquiry. The appeal was never proceeded with because the parties agreed to convert it into a private arbitration.

[4] Following this agreement the parties convened a pre-arbitration conference on 29 June 2006, where the arbitrator's terms of reference were agreed upon. In terms of the terms of reference as set out in the pre-arbitration minute the arbitrator was required to decide whether or not the dismissal of the respondent was both procedurally and substantively fair.

[5] In the event the respondent was found guilty the arbitrator was to determine whether the dismissal sanction was fair.

[6] The respondent was charged with misappropriation of funds, breach of procedures in dealing with the applicant's funds and dishonesty. The common cause facts in relation to the charges proferred against the respondent are recorded in pre-arbitration minutes as follows:

> ***"Charge 1: Alleged Misappropriation of Funds***
>
> *2.1.1 It is agreed that the purchases were made from Dischem Pharmacies by Mr Riaan van der Merwe (Not by Robbie Mason). The purchases were approved by Mr Mason.*
>
> *2.1.2 The request was made for a staff function and was approved by Mr Mason.*

2.1.3 The staff function later turned out to be a Baby Tea Party for a pregnant junior member of staff, who was about to go on maternity leave.

2.1.4 The total amount relating to Dischem purchases were R692.19. The Respondent indicated to the Applicant that there were other purchases on the credit card for which he was charged and found guilty…"

"Charge 2: Breach of Procedures

2.2.1 It is agreed that no quotations were obtained for buying the four unique Artworks for the Administration offices.

2.2.2 It is agreed that no quotation was obtained by Mr Riaan van der Merwe when purchasing a camera. The purchase of the camera was approved by Mr Mason.

2.2.3 There was a notice placed on the Creditors Office of the Finance Department window that read as follows "…if you take an advantage bring the invoice within 24 hours. (Limit of R1000.00 per entity, per day)…"

"Charge 3: Dishonesty: Birthday present for Registrar

2.3.1 It is agreed that a voucher of R1000.00 was brought for Mr Nico Stofberg as a gift, who is the Registrar Academic and the Head of Academic Administration.

2.3.2 Paragraph 6.2 of the Internal Rules of the EXCO Committee of Academic Administration provides that gifts may me brought for Senior Staff from the level of the Deputy Registrar Academic and higher..."

[7] The respondent contended in relation to the charge of misappropriation of funds that he: (a) never wilfully abused the respondents funds, (b) was not involved in fraudulent activity in as far as the funds of the respondent's were concerned, (c) made no personal gain from the transactions related to this charge; and (d) the purchases made were not a personal nature.

[8] The respondent disputed the charge of dishonesty in the purchase of a gift voucher in the amount of R1000.00 for Mr Stofberg, registrar academic and head of academic administration. In this regard the respondent contended that clause 6.2 of the Internal Rules of Executive Committee of Academic Administration allows for gifts to be purchased for senior staff from the level of Deputy Director Academic and higher.

The grounds for review and the arbitration award.

[9] In its founding affidavit the applicant contended that the conduct of the arbitrator in arriving at the conclusion that the dismissal of the respondent was both substantively and procedurally unfair, was grossly irregular and amounted to misconduct.

[10] After summarising the evidence as presented by the parties the arbitrator deals in great detail with the disputed outcome of the chairperson's findings. In this

regard the arbitrator found that the decision of the chairperson of the disciplinary hearing was in line with what was contained in the undated and unsigned document the respondent relied on. The arbitrator further found that the formal or what is referred to as the official outcome of the disciplinary hearing dated 19th May 2006, did not contain any specific indication of what charges the applicant was found guilty of but to an extent confirmed the findings contained in the unsigned and undated document which was presented and relied upon by the respondent.

[11] The arbitrator then concluded that although there was no reference to the unsigned and undated document the initial appeal document which was drafted within a week after the dismissal, (the appeal grounds) related only to the findings of guilt as reflected in the unsigned document. It is for this reason that the arbitrator found that the respondent was found guilty as reflected in the unsigned and undated document.

[12] Contrary to the finding of the arbitrator, it seems to me that the only person who could confirm the contents of the oral outcome of the disciplinary hearing and the contents of the disputed document is Professor Sibara (Sibara), the chairperson of the disciplinary hearing who issued the outcome of the disciplinary hearing. There is nowhere in the testimony of Sibara where the contents of the oral outcome of the disciplinary hearing and those of the disputed document is confirmed. For this reason there was no basis for the conclusion by the arbitrator that the unsigned and undated document contained the findings of Sibara in relation to the charges against the respondent.

[13] In relation to the first charge against the respondent the arbitrator found that the finding of guilt in relation to the first part of this charge to have been incorrect. He further found that the respondent was not guilty of failure to submit invoices of transactions as was alleged by the applicant. And based on the unsigned and undated document the arbitrator concluded that the respondent was not guilty for the purchases of a private nature relating to meals bought by the respondent on the applicant's credit card.

[14] The arbitrator arrives at the above conclusion despite uncontradicted and persuasive evidence presented by the auditors who conducted the investigation into the use of the credit card by the respondent. The evidence presented revealed very clearly that the respondent bought meals for himself and his wife on the way to and back from Cape Town whilst on leave. There was also uncontested evidence in this regard that the respondent used the credit card despite having received a travel and subsistence allowance for the conference he was to attend in Cape Town.

[15] In relation to the second charge the arbitrator found that although the initial approved amount for the purchase of the camera was below R1000-00, the price paid for the camera exceeded that amount and that the respondent failed to obtain approval for such deviation. According to the arbitrator the fact that the purchase price of the camera exceeded the R1000-00, at the point of payment did not excuse the respondent from obtaining *ex post facto* authority for the deviation from the policy limit to the purchase price. The arbitrator further found that the respondent should by virtue of the position he occupied have

been vigilant in relation to compliance with buying policies. And more importantly the arbitrator found the conduct to have been irregular for splitting of claims for part payment of the artwork.

[16] The most important finding upon which, in my view, this matter turns on is the attempt by the respondent to explain the gift to Mr Stofberg as a gift of honour for his leadership. The arbitrator found the explanation to be disingenuous. This Court when dealing with similar finding in *Standard Bank of South Africa Ltd v Mosime & Another (2008) 10 BLLR 1010 (LC)* held that:

> *"[59] The word "disingenuous" in my view, means everything to do with untruthfulness, including dishonesty. There are no degrees of untruthfulness and therefore an employee who is untrustworthy is one who is unreliable, dishonest, undependable, deceitful and cannot be trusted."*

[17] In addition and also of significance in the determination of whether the arbitrator applied his mind properly to the issues before him and appreciated the task before him was the finding that the respondent was stubborn and sometimes arrogant in his denial of the breach of the policies and rules. In my view this attitude did not only have an impact in the delaying the finalisation of the arbitration process, but went to the core of the trust relationship between the parties and cancelled or outweighed all the factors which would have tilted consideration of fairness in favour of a lenient sanction. In other words had the arbitrator applied his mind and appreciated the task which both parties had

required of him, he ought to have found that the conduct and the attitude of the respondent pointed towards lack of remorse on his part. This presented a bleak future and presented no prospects of rekindling the trust relationship between the parties.

[18] As concerning procedural fairness the arbitrator criticised the approach adopted by the applicant in dealing with the investigation. He found that the forensic investigation, which was conducted by KPMG, to have not been intended to be a disciplinary investigation in terms of the applicant's disciplinary code. Clause 5 of the disciplinary Code reads as follows:

> *"… A disciplinary investigation should be held in serious cases, i.e. fraud, theft, etc when substance needs to be clarified, or to formulate correct charges. A hearing shall however, remain a prerequisite when progressive discipline has had no effect, or where transgressions are serious…"*

[19] It is apparent from the reading of the above clause that the arbitrator totally misconstrued the provisions of the disciplinary code. There is nothing in clause 5 that prevented the applicant from using the information acquired from the KPMG investigation to discipline the respondent because it was not initially intended for that purpose. Had the arbitrator applied his mind and properly interpreted the provisions of clause 5 of the Code, he ought to have found that the purpose of the disciplinary investigation was to assist in clarifying the substance of the allegations that may have been levelled against a person

suspected of wrongdoing or to assist in the correct formulation of the charges against such a person. He ought to have also found that the disciplinary investigation was an ideal and recommended approach but did not supercede the prerequisite for a disciplinary hearing *"where transgressions are serious."*

[20] In my view the circumstances of this case did not call for a disciplinary investigation as there was no need to clarify the substance of the allegation against the respondent. There was also no question about the sufficiency of the information to formulate the charges against the respondent. In fact even on the version of the respondent there was no need for the disciplinary investigation. In general the respondent did not dispute the facts surrounding the charges but sought to either explain or justify his conduct.

[21] The conclusion of the arbitrator would still have been grossly irregular even if it was found that the above interpretation of clause 5 of the Code was incorrect. In this regard had the arbitrator applied his mind to the facts and the circumstances of this case he ought to have come to the conclusion that even though there was deviation from the provisions of the disciplinary code it was not of such a nature that it could be said that the employee was denied a fair hearing.

[22] In dealing with the sanction of dismissal the arbitrator correctly finds that :

> *"The seniority of the Applicant played a major role in determining the sanction of dismissal."*

[23] In summary, the arbitrator committed a gross irregularity and misconceived the task before him in that he ignored the fact that the respondent's conduct in failing to comply with policies and rules was grossly irregular and was not justified. The arbitrator fundamentally and completely ignored the fact that the respondent's wife benefited from the use of the applicant's credit card in purchasing food for herself. The respondent continued with the transgression despite being warned by the Chief Financial Officer to desist from such conduct. He was also advised of the consequences that could follow from persistent non compliance.

[24] In considering the fairness of the dismissal sanction, the arbitrator ought to have taken into account not only the case of the respondent but also the reason why the applicant imposed the dismissal sanction. In this regard the arbitrator ought to have given serious consideration to the outcome of disciplinary hearing which was recorded in the memorandum to the respondent dated 19 May 2006. The reasons given in that memorandum read as follows:

> *"1. Some of the purchases made using the credit card (e.g. Dis-Chem Pharmacies) are not covered by the relevant departmental policies- they could not have been made for the benefit of the university.*
>
> *2. No invoices were submitted for a number of transactions – according to Mrs van Graan's testimony, repeated reminders were sent to Mr Mason's office in this regard.*

3. *While practices and relevant policies allow for deviations from rules and regulations in certain instances, there is no proof that Mr Mason sought permission to deviate from such rules and regulations when a camera and some works of art were bought in 2004.*

4. *Mr Mason purchased a birthday present for Mr Stofberg for a thousand rand although his won EXCO's guidelines explicitly states that special funds shall not be used for purchases of birthday presents.*

Tshwane University of Technology views these transgressions in a very serious light. If there is no discipline at Tshwane University of Technology and senior members of staff wilfully ignore lawful practices and policies the institution will fail. We also need to ensure that action is taken against offenders irrespective of their standing in the institution. This letter therefore serves as notice of dismissal with immediate effect."

[25] In my view, the arbitrator failed to apply his mind to the circumstances and the totality of the facts which were presented to him and thereby fundamentally failed to afford the applicant a fair trial.

[26] In the light of the above discussion, the arbitration award stands to be reviewed. In my view, fairness does not dictate that costs should follow the results.

[27] In the premises, the following order is made:

(i) The arbitration award issued by the arbitrator is reviewed and set aside.

(ii) The decision of the arbitrator is substituted with the following award:

"The dismissal of the applicant, Mr Mason, was both substantively and procedurally fair."

(iii) There is no order as to costs.

Molahlehi J

Date of Hearing : 29th May 2008

Date of Judgment : 25th November 2008

Appearances

For the Applicant : Adv F A Boda

Instructed by : Nkaiseng Chenia Baba Pienaar & Swart Inc

For the Respondent: Adv H M Barnardt

Instructed by : Len Dekker Attorneys