IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 531/08

In the matter between:

WESTONARIA LOCAL MUNICIPALITY	APPLICANT
AND	
SOUTH AFRICAN LOCAL BARGAINING COUNCIL	1ST RESPONDENT
LEGODI, M M N.O.	2ND RESPONDENT
BALATEDI MOIRA MOGATUSI	3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application in terms of which the applicant seeks to review and set the arbitration award issued by the second respondent (the arbitrator) under the case number GPD010712 and dated 26th January 2008. In terms of the award the arbitrator found the dismissal of the third respondent to be unfair and ordered that she be reinstated.

[2] The key issue which the arbitrator had to determine was whether the sanction of dismissal was an appropriate sanction under the circumstances having regard to the consistency or parity principle.

Background facts

[3] The facts in this matter are fairly common cause. The third respondent who I shall in this judgment refer to as "the employee" was prior to her dismissal employed by the applicant, the Westonaria Local Municipality, as the personal assistant to the executive mayor. The employee was appointed to that position further to undergoing an interview. The position as was advertised in the media required a candidate in possession of standard 10 qualification with 6 (six) years experience, computer literacy, good typing skills and experience in certain computer programmes.

[4] During the interview the employee represented to the panel that she was in possession of standard 10 certificate. It turned out 3 (three) years later that she did not have such qualification. She was as a result of this charged for misrepresenting her qualification. At the disciplinary hearing she pleaded guilty to the charge of misrepresentation and was as result dismissed on 14th December 2006.

[5] The employee being unhappy with the outcome of the disciplinary hearing referred a dispute concerning unfair dismissal to the bargaining council which arbitrated the dispute on 19th November 2007. As stated earlier the arbitrator

who conducted the arbitration proceedings found the dismissal to be unfair and ordered reinstatement of the employee.

[6] The employee relied, during the arbitration proceedings, on inconsistency of the application of discipline by the applicant. She in this respect relied on the case of another employee of the applicant, Ms Molelekeng who was not dismissed for having falsified her certificate. Ms Molelekeng who was initially employed as clerical assistant applied for the position of clerical assistant in the Department of Public Safety. She later applied for the post of traffic officer in the same department. The applicant discovered after unsuccessful application for that post of traffic officer that she did not have a valid standard 10 certificate.

[7] According to the applicant Ms Molelekeng pleaded guilty to the act of dishonesty and was found guilty as charged. She was however, not dismissed because she entered into a plea bargaining agreement with the applicant in terms of which she undertook to assist, as a witness or otherwise, in the prosecution of her senior, Mr Mfolo who was apparently charged with corruption. The other reason for not dismissing Ms Molelekeng was according to the applicant because the position she had applied for did not require standard 10 qualification.

Grounds for review

[8] The applicant challenges the award on the grounds that the arbitrator committed misconduct and/or irregularity by arriving at a conclusion which is unjustifiable and did so without applying his mind to the evidence presented. The arbitration

award is also challenged on the ground that it is a decision which a reasonable decision maker could not have made.

[9] In support of the above grounds of review the applicant contended that the arbitrator failed to appreciate that an act of dishonesty, particularly misrepresentation to your employer damages the trust relationship upon which the employment contract is based on. It was argued on behalf of the applicant that the case of break down in the trust relationship was more compelling in the present case because the employee was a personal assistant to the executive mayor and that the fact that the employee had rendered satisfactory performance was irrelevant.

[10] In relation to the application of parity, the applicant argued that the consequence of the arbitrator's finding was that in future if an employee was found guilty of dishonesty, particularly of misrepresentation, that employee should not be dismissed. This approach was according to the applicant undesirable and not conducive to effective employment relationship between the employee and the employer.

[11] The applicant contended that the arbitrator was not mindful about the distinction between the cases of the employee and that of Ms Molelekeng. The applicant contended that the distinction which the arbitrator missed between the two cases was that in the case of the employee she misrepresented her qualification whereas Ms Molelekeng on the other hand had an agreement through which she

undertook to testify against another person who was accused of being involved in corrupt activities.

The arbitrator's award

[12] It is apparent that in arriving at the conclusion that the sanction of dismissal was unfair the arbitrator reasoned that the applicant had inconsistently applied its approach to discipline in cases of dishonesty. In this respect the arbitrator says that it could not be disputed that Ms Molelekeng had submitted a falsified certificate to the applicant which purported that she was a holder of a valid matric certificate. The employee on the other hand had furnished a document that indicated that she sat for and failed the Senior Certificate in 1994.

[13] The arbitrator further found that the conduct of the employee of presenting to the panel that she had matric qualification was indeed an embarrassment to the executive mayor. However, the arbitrator found that the embarrassment did not amount to irreparable breakdown of trust between the applicant and the employee. In this regard the arbitrator had the following to say:

> *"There is no evidence before me that there was a breakdown of trust between the parties, which could not be repaired by other means."*

[14] As concerning comparison between the conduct of the employee and that of Ms Molelekeng the arbitrator found that the falsification of the certificate was more serious than that of misleading the panel.

Evaluation

[15] The test in evaluating whether or not to review an arbitration award issued in terms of the Labour Relations Act 66 of 1995, is that enunciated in *Sidumo & another v Rustenburg Platinum Mines Ltd & other [2007] 12 BLLR 1097(CC).* In terms of that judgment and those that followed thereafter the question to answer in assessing whether to interfere with the arbitration award is whether the decision of the arbitrator is one which a reasonable decision maker could not reach.

[16] It is trite that in unfair dismissal disputes the first task of the arbitrator is to determine whether the employee was guilty of the offence he or she is alleged to have committed. If it is found that indeed the employee was guilty as charged the next task of the arbitrator is to enquire into the fairness of the sanction imposed by the employer. The onus to show that the employee was guilty of the offence and that the dismissal was fair rests with the employer. The employer also bears the duty to show that the trust relationship between it and the employee has broken down because of the offence committed by the employee.

[17] In the present instance the arbitrator having found the conduct of the employee unacceptable the issue for determination concerns the conclusion by the arbitrator that the sanction of dismissal was too harsh in the context where the applicant was inconsistent in the application of discipline.

[18] In terms of Schedule 8 of the Code of Good Practice: Dismissal, a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair

procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. The Schedule further provides that the determination of whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. The key question which an arbitrator has to ask himself or herself is simply, as was put in *Engen Petroleum Ltd v CCMA & others (2007) 8 BLLR 707 (LAC), "Is this dismissal fair?"* The person to answer this question is the arbitrator and no one else. In dealing with this issue in that case the LAC had this to say:

> *"The ordinary and natural meaning of the word "fair" suggests that commissioners must answer that question on the basis of their own sense of fairness. The question cannot possibly be answered on the basis of somebody else's notion of fairness. This was the position adopted by the courts under the 1956 LRA. There is no basis for assuming that the position has changed under the current LRA."*

[19] It has been consistently held by the Courts that the responsibility for determining the appropriateness of dismissal as a penalty is a matter to be left to the discretion of the arbitrator. In this respect the Constitutional Court in *Sidumo* said the following:

> *"[75] It is a practical reality that, in the first place, it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute,*

to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are, therefore, no competing "discretions". Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace."

[20] The Constitutional Court went further at paragraph [78] to say:

"[78] In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list"

[21] In the present instance the arbitrator in concluding that the dismissal was unfair because of the harshness of the sanction located the basis of this conclusion in what he found to have been the inconsistent application of discipline by the applicant. In *Gcwensha v CCMA & Others (2006) 3 BLLR 234 (LAC),* the Labour Appeal Court, in confirming its decision in *Irvin & Johnson (1999) 20 ILJ 2303(LAC)* held, that**:**

> *"Disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standards."*

[22] The Court went further so say:

> *"... when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated* **...***"*

[23] Another important aspect in the assessment of the reasonableness of the arbitrator's award concerns the conclusion that there was no evidence showing that the trust relationship between the parties has broken down. The applicant contended in its answering papers that an act of misrepresentation by an employee to his or her employer damages the trust relationship. This argument accords with the view expressed in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others (2000) 21 ILJ 1051 (LAC),* at paragraph 17, where Conradie JA in dealing with what ordinarily could happen when it is found that the employee had committed a serious misconduct. In this respect the Learned Judge had this to say:

"[17] The commissioner characterized the misconduct as serious. Despite that, she concluded that the relationship of trust between the appellant and the employees had not broken down. Where an employee has committed a serious fraud one might reasonably conclude that the relationship of trust between him or her and the employer has been destroyed. When the employer then asserts that this has in fact happened, it would be startling to hear a commissioner proclaim that, despite what one might expect and despite what the employer says in fact occurred, the relationship of trust had not been broken down."

[24] What is important however is what is said in the last part of the above paragraph where the Learned Judge proceeded to say:

"Of course, a commissioner is not bound to agree with an employer's assessment of the damage done to the relationship of trust between it and a delinquent employee, but in the case of a fraud, and particularly a serious fraud, only unusual circumstances would warrant a conclusion that it could be mended.

[25] The approach similar to the above observation made by Conradie JA in *De Beers Consolidated* matter was followed in the case of *Standard Bank of SA v CCMA & others (1998) 19 ILJ 903 (LC),* where the court held that dishonesty in general renders the employment relationship intolerable and incapable of restitution. See also *Central News Agency v CCAWUSA & another (1991) 12*

ILJ 340 (LAC) and *Toyota SA Motors (Pty) Ltd v Radebe & others (2000) 21 ILJ 340 (LAC).* There is also authority that holds the view that it is not every act of dishonesty that will lead to automatic dismissal. In *Toyota SA Motors (Pty) Ltd v Radebe & others (2000) 21 ILJ 340 (LAC),* the Court found that it is not an invariable rule that offences involving dishonesty necessarily attract the sanction of dismissal.

[26] It is clear from the above that the duty to show that the trust relationship between an employer and employee has broken down due an act of serious misconduct rests with the employer. Mlambo JA in the recent unpublished case of *EDCON Ltd v Pillemer NO and Others case number 191/08* held that:

> *"[22] Pillemer was entitled and in fact expected, in the scheme of things, to explore if there was evidence by Edcon and/or on record before her showing that dismissal was the appropriate sanction under the circumstances. This was because Edcon's decision was underpinned by its view that the trust relationship had been destroyed. She could find no evidence suggestive of the alleged breakdown and specifically mentioned this as one of her reasons for concluding that Reddy's dismissal was inappropriate. A reading of the award further reveals that in addition to this finding Pillemer also found that in the context of that matter Reddy's long and unblemished track record was also an important consideration in determining the appropriateness of her dismissal.*

[23] . . . in my view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair. She cannot be faulted on any basis and her conclusion is clearly rationally connected to the reasons she gave, based on the material available to her. She did not stray from what was expected of her in the execution of her duties as a CCMA arbitrator."

[27] Turning to the facts of this case the arbitrator cannot be faulted for arriving at the conclusion that the dismissal was unfair because of the severity of the sanction. The employer has the responsibility of setting the standard of conduct he or she requires employees to comply with and to apply such standard consistently. Failure to apply the standard consistently could lead to the conclusion that non compliance with the standard by the employee cannot be regard as serious enough to warrant a dismissal.

[28] Whilst the facts of the case of the employee and those of Ms Molelekeng are not exactly the same, it is apparent that the arbitrator considered the issue of consistency in the context of the broader standard set by the applicant. It would seem the applicant is an employer who does not apply the so-called zero tolerance to acts of dishonesty. In the case of Ms Molelekeng the applicant was prepared to treat forgery of a certificate as not being so serious to warrant a dismissal. In this respect the applicant was prepared to enter into negotiations

with a fraudulent person and concluded the so-called plea bargaining agreement with her. The same standard was not used in measuring the sanction to be imposed on the employee by the applicant and thus the arbitrator was correct in exercising his discretion by concluding that dismissal of the employee was unfair. It is this factor that influenced the commissioner's sense of fairness.

[29] It seems to me that the person who could testify about the impact that the conduct of the employee had on the trust relationship was the executive mayor. There is nothing in the record that indicates that such evidence was presented by the executive mayor. The facts of this case are different to those of the employees in the *De Beer's* case where the employee denied wrongdoing and showed no remorse. The same distinction applies to the facts in the *Hulett Aluminium (Pty) Ltd v Bargaining Council for Metal Industry & Others (2008) 29 ILJ 1180 (LC)* where this Court held that:

> *"[45] It would in my view be unfair for this court to expect the applicant to take back the employee when she has persisted with her denials and has not shown any remorse. An acknowledgment of wrongdoing on the part of the employee would have gone a long way in indicating the potential and possibility of rehabilitation including an assurance that similar misconduct would not be repeated in the future.* See in this regard *De Beers Consolidated Mines Ltd v CCMA & others (2000) 21 ILJ 1051 (LAC)."*

[30] In the present case it is common cause that the employee performed her duties with excellence and integrity. She was competent and efficient in what she was employed to do. Unlike in *De Beers and Hulett Aluminium* cases the employee owned up to her wrong doing as soon as she was confronted with the allegations relating thereto.

[31] In my view, there is no basis for interfering with the decision of the arbitrator and furthermore I see no reason in law and fairness in the circumstances of this case why costs should not follow the results.

[32] In the premises the application to review and set the arbitration award issued under the case number GPD010712 and dated 26th January 2008 is dismissed with costs.

Molahlehi J

Date of Hearing : 22nd October 2009

Date of Judgment : 18th November 2009

Appearances

For the Applicant : Adv G Raath

Instructed by : Motlatsi Seleka Attorneys

For the Respondent: Adv H Barnes

Instructed by : Cheadle Thompson & Haysom Attorneys