



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

Case no: C96/2013

In the matter between:

CITY OF CAPE TOWN

First Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

MELWYN NASH N.O.

Second Respondent

SIPHIWE FREDDIE

Third Respondent

Date heard: 26 November 2013

Date delivered: 15 February 2014

Summary: Review of an arbitration award

JUDGMENT

Rabkin-Naicker J

- [1] The applicant (the City) seeks the review, setting aside and substitution of an arbitration award under case number WC M041204 dated 19 December 2012. In the award of the second respondent (the Arbitrator) found that the dismissal

of the third respondent (Freddie) was substantively unfair and reinstated him with retrospective effect from 5 March 2012.

- [2] The grounds of review set out in the founding affidavit include that the Arbitrator committed misconduct in relation to his duties as arbitrator; and/or committed a gross irregularity in the conduct of the arbitration proceedings; and/ or exceeded his powers as an arbitrator. Furthermore, it is alleged that the Arbitrator's finding that the employment relationship between the City and Freddie had not broken down irretrievably, reflected his disregard of evidence led at the arbitration hearing and/ or a failure to apply his mind to the factual and legal issues before him. Such a finding is therefore described as one that a reasonable decision maker could not have arrived at.
- [3] Freddie was charged with misconduct: "in that between 25 February 2011 and 15 April 2011, in various e-mail communications and in a one-on-one situation, he was grossly insubordinate/ insubordinate in that he acted in an insolent, provocative, aggressive and intimidatory manner towards his management team." It should be noted that on 15 April 2011 he was suspended by the City effective for about three months. A further charge followed on or about 2 June 2011: "in that he committed serious misconduct when he e-mailed his manager Robson a derogatory, insolent, racist, provocative and offensive e-mail."
- [4] Freddie had commenced employment with the City on 22 November 1993 and sought reinstatement at the arbitration. He had started his employment as a general worker in the Solid Waste Department where he worked on trucks and swept streets. A year later he was appointed as a clerk in Solid Waste. He occupied this position for nine years before appointment to the public participation unit which deals with managing the relationships between the City and community stakeholders. The unit had proposed that Freddie be placed as a professional officer and his unhappiness related to his placement as an assistant professional officer.
- [5] It is recorded in the award that the acting director: Governance and Interface Mr Irwin Robert Robson (Robson) testified that he attempted to secure Freddie's placement as professional officer but he could not be placed higher

than four grades in terms of the City's policies, which is what would have happened if he had been placed in that position. Robson is recorded as testifying that Freddie's insubordination was triggered by a directive from the Speakers Office to account for how Robson's staff utilized their time and that he had instructed the staff in the unit to provide a detailed breakdown of their projects. Freddie's report did not meet the necessary requirements. Freddie had simply supplied him with an e-mail with attachments without explanation. The format was unacceptable and incomprehensible. In the office of the professional officer, a Mr. Frederick Venter (Venter), he asked Venter to help Freddie with compiling the report. Freddie questioned why he was supposed to take instructions from Venter and stated that Robson's intentions were to promote Venter. Freddie refused to work with Venter and embarked on a bombardment of e-mails directed to Robson.

- [6] At a team meeting between Robson, Freddie and Venter, Freddie had become aggressive and threatening according to Robson, and remarked " I will deal with you". In an e-mail from Freddie to Robson he had claimed that Robson was guilty of undermining, belittling and victimising him. There followed a one-on-one interview between Robson and Freddie on 15 April 2011. At the meeting Freddie raised an issue around Venter's management of a particular project and worked himself into frenzy. Robson testified that he reached the end of his tether and considered Freddie an "ingrate" and confronted him about his attitude and behaviour. Freddie got up and walked over to him and pointed his finger in his face and remarked "you have the attitude". As a bluff Robson remarked he was recording the discussion. He said Freddie was shocked. It was after this that he approached the City Manager calling for Freddie's 3 month suspension which was implemented.

- [7] On his return from suspension, Freddie went to assist a unit in the governance and interface directorate. It is recorded in the award that Robson disputed Freddie's contention that he favoured white staff members. Venter was the only white staff member and Robson stated that Freddie mistook his kindness for weakness, hence his behaviour. He stated that he could never ever work with Freddie in the future as he adds no value. He said that Freddie

had tarnished his name by making statements that he was “ Mr racist, racist of the highest order and comparing him to Hendrick Verwoerd”.He further testified that after his dismissal on 30 November 2011 Freddie persisted with sending derogatory e-mails to the City blaming all and sundry for his dismissal and that this indicated he would not change, and confirms that the breakdown of the employment relationship was irretrievable. It was also the evidence of Robson that Freddie had a past disciplinary record when he was in the Solid Waste Department.

- [8] It is recorded in the award that Freddie acknowledged that he was issued with a written warning in around 2000 while in Solid Waste because of an argument with a colleague. He briefly described the incident as a matter where a colleague called him a “kaffir”. He had responded in a derogatory fashion and later apologized. Both parties were disciplined. The recordal of Freddie's evidence includes the following paragraphs of the award:

"31. He described his unhappiness regards placement as a lack of acknowledgement by the respondent that he was the first person in the PPU and responsible for training newcomers. Early on there were discrepancies around staff salaries and this continued until 2008 when the ORP (Organisational Realignment and Parity) process unfolded. His designation as APO did not change whilst all other staff members were placed higher. He objected to the placement. He was frustrated as the reasons advanced were unreasonable. Robson convinced him to sign off on the placement on the assumption that the placement would be challenged via the TASK process.

32. He relayed an instance where Robson chased him out of the office due to being late for a meeting. He stated that the nature of his work requires him to consult with community stakeholders on a daily basis and on the day of the meeting, it was no exception as he was in consultation with parties and forgot about the meeting. He arrived late and apologised but Robson ridiculed him in front of colleagues. He took exception and at a later confrontation, he tried to explain this to Robson but was humiliated and chased out of his office.

33. In evidence of his claims of being regarded as worthless, victimised and belittled he stated that there was an issue around the use of his car

despite the fact that he does not receive a car allowance. In addition, he was one of the older members of staff and it was humiliating when Robson embarrassed him in front of younger staff. He felt that because he was black, Robson did not respect him, despite his contention that he was the most sacrificing employee in the unit without any form of appreciation for this. In addition, he was always designated to get old office furniture as compared to his colleagues and was the only one required to use a printer not located in his office.

35. He concedes that comparing Robson to Hendik Verwoed was uncalled for but added this was out of frustration and he worked in a hostile environment. Nonetheless, he takes responsibility for the statement. 37.

37. The one-on-one meeting on 15 April 2011 with Robson, started in a cordial fashion but in the course of the meeting, Robson confronted him with why he does so little work. His response was that Robson should ask himself the question as he was responsible for allocating work. Robson remarked that he was pathetic and destruction to the unit. An argument ensued and Robson ended up pointing at him and he pointed back.

38. He does not regard the relationship is destroyed and he was informed by former colleagues that his position is still vacant. He conceded that his relationship is probably broken down in respect of certain individuals but not with the respondent.

39. In hindsight, he would properly have done things differently as one learns from their mistakes and he takes responsibility for his actions where he made certain comments. Is he feels he had legitimate issues but he adopted the wrong approach.

40. He confirms that despite the broken the relationship with Robson he would be willing to work with him.....

42. He was confronted with the contention that he did not show remorse at the hearing and his response was that he did. Further, he responded that his remorse during the arbitration was genuine as he has since been guided by people and despite management failing him with his concerns he accepts that

his statements regarding comparing Robson to Verwoerd were wrong. Had there been an earlier intervention the matter would not have escalated."

- [9] The e-mails of 2 June 2011 which was sent by Freddie to Robson included the following:

"you can fool everybody in that office, pretending as if you care about black people, I have been with you for a long time ago when, I know you back to front, you are racist of the highest order, the way I look at you you're even more than Verwoerd. I was born at the height of apartheid , you cannot fool me about racism, you are a racist 101, if you have never been told who you are, today you're getting it from me. I'm telling you your true colours and I'm wondering as to how did you choose to be an advocate, while at the same time being a party to oppression by the imperialist. It's just contradictions, maybe you should attempt to practice your profession, so that you know exactly what it means...."

- [10] The reason given for a finding of guilty on the charge in respect of this e-mail at the disciplinary hearing, which was part of the record before the Commissioner reads as follows:

"1. The e-mail from your address... on 2 June 2011 brought rise to this charge. In this mail to Mr Robson you alleged that he was a racist of the highest order. No evidence was led that Mr Robson was in fact was a racist or behaved in a racist fashion. You cited a few examples of perceived racism like return to work interviews which you refused to attend (unlike your colleagues). Printing to a common printer, (in fact I print to a common printer as it is common practice in Council). Your manager not favourably resolving your placement and the perceived idea that you were to report to Mr F. Venter subsequent to Tessa leaving the employ of Council. The aforementioned examples does not amount to racism or racial discrimination. Your derogatory, insolent, racist, provocative and offensive e-mail to Mr Robson is tantamount to Serious misconduct hence the finding of guilty of this charge."

- [11] In relation to the second charge facing Freddie the Arbitrator found that Freddie was guilty of making the derogatory and offensive statements. He found in paragraph 56 of the award as follows:

".... Freddie admitted that the e-mails he sent were uncalled for and in bad taste and that he accepts responsibility for his actions. Notwithstanding the admission, Freddie failed to convince me that there was substance to the allegations of being racist and displaying a racist attitude and the issues he raised were primarily unhappiness with Robson's management of the unit. Freddie confirmed that he was acting on what he witnessed and in his view, he witnessed racism. This is a subjective view presents merely as a perception. When making a serious accusation of racism the source of the statement must ensure there is substance to the contention and not simply presented as an allegation without sufficient proof."

- [12] The Arbitrator, having found that Freddie was guilty of the two charges on which he was dismissed, refers to the case of Sidumo more especially that the arbitrator's role is not to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. He goes on to find as follows in his award:

"61. The seriousness of Freddie's conduct cannot be denied. The tone of his communications and approach he followed was inappropriate and, specifically in relation to the second charge, he expressed his acknowledgement that he dealt with the matter incorrectly. Importantly he mentioned that he came to this understanding after he consulted with his attorney and other advisers who showed him the error of his ways. I believe that he showed genuine remorse for his conduct at the hearing of this matter and he acknowledged that he now understands the nature of being subservient to the instructions of his employer.

62. A further factor considered is Freddie's history with the respondent. In my view it is of significance to consider that he has been employed with the respondent for 18 years. His career path indicates

that he progressed from a general worker in solid waste to a professional position within the PPU. In the course, he managed to obtain a B TEC degree. I find this significant as I deem reasonable to assume that there is very few other staff in the respondents employ that would have progressed to the extent Freddie did. His career path also suggests that he enjoyed a measure of satisfaction in being of service to the respondent.

64. The issue whether the employment relationship has been irretrievably broken must also be considered. Robson testified that the mutual understanding was that the relationship is beyond repair and I have an understanding for his contention however, the evidence seems to suggest that there were never constructive attempts to sit down and deal with the matter. I have a concern with Robson's contention that no other manager would be able to manage Freddie. This is speculative and given the length of Freddie service needs to be approached with caution. Further evidence was led that when he returned from suspension he worked in a sister unit within Governance and Interface. It is assumed that he worked under supervision there and I was not presented with evidence of difficulties experience in managing him in that department."

- [13] It is submitted in behalf of the City that the Arbitrator in effect found Freddie "guilty" of lesser forms of misconduct than those for which he had been dismissed. Further, that no reasonable decision maker would find dismissal for misconduct involving gross insubordination and insolence, provocative, aggressive, intimidating and racist behaviour to be substantively unfair. The award, it is argued, could only be arrived at by closing one's eyes to the most serious aspects of Freddie's misconduct. These submissions on behalf of the City deal in some detail with the Arbitrator's consideration of case law that has dealt with racist behavior and refers to the judgment in **Vodacom (Pty) Ltd V Byrne NO and others**¹ in which Van Niekerk J held as follows:

¹ (2012) 33 ILJ 2705(LC)

" The Commissioner's analysis is one that considers the term "racism" as limited to its definition of exhibiting racial prejudice. This he distinguished from the invidious act of falsely imputing racism to another in order to discredit them. The commissioner's position might be challenged on a number of grounds and reasonable people will no doubt come to different conclusions in any debate on the issue. There are those who would argue that playing the race card is an inherently racist act; there are those who would argue that it is not. Indeed, there are those who argue that black people cannot be guilty of racism. But it is not for the court to consider the aptness of the commissioner's analysis – the issue is whether his reasoning and the resulting decision meet the *Sidumo* threshold of reasonableness."

- [14] This in my respectful view is the correct approach to take to a matter such as the one before me. Mr Conradie's excursus into the principles set out in various cases on the question of racism, and the distinguishing of facts in those cases from that in casu, is not of assistance. What must be determined by this court is whether on the material before the Commissioner, he arrived at an unreasonable result. In **Herholdt v Nedbank Ltd**² the Supreme Court of Appeal considered the law as it stood after **Sidumo** and summarised it thus:

"[25] In summary, the position regarding the review of CCMA awards is this: a review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

² (701/2012) [2013] ZASCA 97

[15] The submission that the way in which the Arbitrator allegedly made findings on lesser grounds of misconduct than actually occurred, amounts to an argument that no reasonable commissioner could reinstate a person guilty of the misconduct complained of.

[16] In the constitutional era reasonableness in the administrative law context has been authoritatively set out in **Bato Star**³ where the Constitutional Court held that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. The court went on to say that:

“What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

[17] This case tells a uniquely South African story. Freddie, an African man who had grown up during the height of apartheid and who had risen through the ranks from a worker cleaning the streets to an administrative official felt that the way he was spoken to by Robson, a white man, in front of younger members of the Department, reflected racism. He felt disrespected. He became over sensitive to every issue, even the question of the location of the printer he was given to use, and the furniture in his office. Robson on the other hand was confounded and deeply hurt by the allegations made by Freddie that he was a racist as he clearly considers himself never to have

³ 2004 (4) SA 490 (CC) at paragraph 45

subscribed to racism. Given our history, the gulf in perception between these two men is most likely one that is to be found in many workplaces in our country. These factors are relevant to the decision made by the Arbitrator in this matter.

[18] In coming to his decision that the dismissal was substantively unfair, the Arbitrator takes the length of service of the employee, and his background into account. He also, properly, deals with the issue of remorse shown by Freddie. In as far as taking Freddie's previous disciplinary record into consideration he deals with one written warning given to Freddie and alludes to the undisputed evidence that Freddie was derogatory and disrespectful to a colleague after he had been called a "kaffir". The Arbitrator's view that the employment relationship had not irretrievably broken down would certainly be problematic if Freddie had been employed in a small company. However, the Arbitrator takes into account the scale of the operations of the City when he ordered reinstatement. In all the circumstances, I do not find that the Commissioner misapplied the **Sidumo** test when he dealt with the question of the fairness of the sanction of dismissal. His decision is not one that a reasonable decision maker could not make.

[19] I also take into account, in finding that the decision that the dismissal was substantively unfair is within the realms of reasonableness, that Freddie was already punished by means of the three-month suspension in respect of the misconduct which occurred before June 2012. The Arbitrator's decision on the remedy to be awarded is well reasoned– the preferred remedy of reinstatement is ordered but without full back- pay. However, given the misconduct for which Freddie was charged, it is my judgment that the Arbitrator should have, in addition to ordering limited back-pay, have ordered that Freddie be reinstated subject to a final written warning. The review application was by no means frivolous and I do not deem it equitable that costs should follow the result in this matter. Mr. Freddie was not represented in this court. I therefore order as follows:

Order

1. The review application is dismissed save that paragraph 71 of the Award is substituted as follows:

“71. The reinstatement is to operate with retrospective effect from 05 March 2012 and is subject to a final written warning operative for a period of 12 months from the date that Sphiwo Freddie resumes his employment.”

2. There is no order as to costs.

Rabkin-Naicker J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr B. Conradie of Bradlie Conradie Attorneys

For the Third Respondent: In person