REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case no: C1019/2012

In the matter between:

BITOU MUNICIPALITY **Applicant**

and

SOUTH AFRICAN LOCAL MUNICIPALITY

BARGAINING COUNCIL **First Respondent**

COMMISSIONER COEN DE KOCK N.O **Second Respondent**

LONWABO MNINAWA RONALD NGOQO **Third Respondent**

Heard: **12 February 2014**

Delivered: **24 October 2014**

Summary: **Errors which lead commissioners reach unreasonable decisions render their arbitration awards reviewable.**

Review in terms of section 145 of the Labour Relations Act – Dismissal for misconduct.

JUDGMENT

LALLIE J

Introduction

[1] This is an application to review and set aside an arbitration award of the second respondent ('the arbitrator') in which he found the third respondent's dismissal both substantively and procedurally unfair and ordered his reinstatement. It is opposed by the third respondent.

Condonation

[2] The founding and the replying affidavits were filed late by 8 and 4 days respectively. The applicant applied for condonation of the lateness. The condonations were unopposed. In both instances, the degree of lateness is not substantial, the applicant proffered reasonable explanation and the delay did not cause the third respondent prejudice. I am satisfied that the applicant showed good cause. The applications should, therefore, succeed.

[3] The third respondent's answering affidavit was filed about eight months out of time. He applied for condonation. His application was opposed by the applicant. The explanation that the third respondent forwarded for the delay was that there were on-going settlement negotiations between the applicant and himself. The applicant denied that the attempts to settle the dispute were responsible for the delay as the applicant informed the third respondent as early as February 2013 of its intention to launch the review application. It also reminded the third respondent's attorneys to file the answering affidavit. All they did was promise to file it. The applicant argued that the third respondent should not be allowed to rely on his lack of funds to pay his counsel fees owing to unemployment as he got alternative employment which remunerated him at the monthly rate of R 80 000.00 after his dismissal. The unavailability of the third respondent's counsel because she was on maternity leave did not constitute reasonable explanation according to the applicant because the period of the unavailability is not disclosed. Counsel was also briefed to file the answering affidavit three months after it was due.

[4] Part of the applicant's attack on the third respondent's explanation for the delay in filing his answering affidavit is justified, however, the validity of some arguments in the third respondent's favour cannot be denied. When his counsel who had assisted him at the disciplinary enquiry and the arbitration hearing,

which generated a lot of documents, was unavailable, it was not financially viable for him to enlist the services of another as he is funding his own litigation. The applicant contributed to the delay in that it did not respond within reasonable time to the third respondent's application for assistance with fees for his legal team when such application was made in terms of section 119A of the Municipal Systems Act (MSA).

[5] The applicant argued that it was prejudiced by the delay as it is entitled to have the matter brought to finality. The test for condonation for the late filing of an answering affidavit is less stringent than the test for condonation of the late filing of a founding affidavit because the respondent is not *dominus litis*. An applicant can prevent the effects of a delay in the filing of an answering affidavit by requesting the registrar to enrol the matter for hearing on the unopposed roll when the *dies* for filing the answering affidavit have prescribed. It was, therefore, not necessary for the applicant to suffer the eight months' delay. The applicant argued that this matter is not complex. It was complicated by the third respondent and the arbitrator. This submission is an oblique reference to the fact that the matter was complicated when the answering affidavit became due, as the arbitrator had, on the applicant's admission, already complicated it.

[6] A number of judgments that the applicant sought to rely on for the dismissal of this application deal with condonation for the late filing of applications by applicants who are *dominus litis* whose period for filing their applications is governed by the Labour Relations Act 66 of 1995 ('the LRA') and not the Rules. In *Mabaso v Law Society, Northern Provinces and Another*,[1] the Constitutional Court dealt with condonation as follows:

> '[20] …It is trite law that a court considering whether or not to grant condonation exercises a discretion. (footnote omitted) The discretion must, of course, be exercised judicially on a consideration of all the facts and 'in essence it is a matter of fairness to both sides.

[7] The standard for considering an application for condonation is the interests of justice. Relevant factors in determining whether it is in the interests of justice

[1] 2005 (2) SA 117 (CC) at para 20.

that condonation be granted include but are not limited to the nature of the relief sought, the extent of the delay, its cause, its effect in the administration of justice and to other litigants and reasonableness of the explanation.[2]

[8] The delay is excessive. Its explanation cannot be said to be reasonable. The third respondent has reasonable prospects of success in that he could be successful, if the allegations he seeks to rely on are proved. In opposing the review application, the third respondent seeks to assert his rights in terms of an arbitration award which had been granted in his favour. Other litigants will not be prejudiced in the event of this application being granted as there is no danger of memories of witness having faded as all the evidence the applicant needs to present its case is already before court. The applicant has already filled the vacancy left by the third respondent's dismissal. The applicant is the local government and the third respondent was its senior official. It is in the interest of both parties that this application be granted for both parties to be heard and the review application properly ventilated. When all the facts of this application are considered, the interests of justice require that the application be granted.

Factual background

[9] The third respondent was employed by the applicant as its municipal manager. Arising from the manner in which he performed his duties, the applicant preferred seven charges of misconduct against him. A disciplinary enquiry was instituted and it found him guilty of the following charges:

> 'Charge 1
>
> During the process of purchasing certain land on behalf of the Municipality the Employee had "transgressed section 61(1)(a) and 61(1)(c) of the Local Government Municipal Financial Management Act 56 of 2003 in that:
>
> He misrepresented to the seller's conveyance[r]s that the Municipality had obtained the funds to pay the agreed price; and

[2] See *Van Wyk Unitas Hospital and Another* 2008 (4) BCLR 442 (CC) at para 22.

[He] did not refer to the conditions attached to the funds thus giving the false impression that the suspensive condition contained in the Deed of Sale had been met.

Charge 3

That he transgressed section 32 of the Act, read with the definition of "unauthorised expenditure", in that he "authorised expenditure of money appropriated for a specific purpose other than for that purpose alternatively that [he] authorised spending of an allocation referred to in paragraphs 'B', 'C' and 'D' of the definition of allocation of allocation in the same Act other than in accordance with the conditions of that allocation.

Charge 6

That he transgressed section 66 (before amendment) of the Local Government Municipal System Act 32 of 2000, placing on a Municipal Manager the duty to approve a staff establishment, in that he "grossly derelicted" that duty as he had "since 1 March 2008 till end June 2011 failed to approve this establishment, causing [a] lack of approved organisational structure within the municipality.

Charger 7

That he transgressed section 2(a),(b) and (d) of Schedule 2 of the said Act in that he instructed his attorney "to address a letter to the Executive Mayor, the Speaker and the representative of the Western Cape Provincial Government dated 13 July 2011, purporting to be doing so on behalf of the members of staff of the Municipal Council.'

Dismissal was found to be the appropriate sanction.

[10] The third respondent challenged the fairness of his dismissal at the first respondent. When the dispute was scheduled for arbitration, the applicant and the third respondent agreed that the transcript of the disciplinary proceedings would form part of the arbitration proceedings. The bundles of documents which were presented at the disciplinary enquiry would serve the same purpose at the arbitration. They further agreed that the arbitrator would retain the right to call for further evidence. The third respondent's case was based only on the charges that he had been found guilty of. Both parties submitted closing

arguments. The arbitrator based his award on the above-mentioned documents.

The award

[11] In his reasons for his decision, the arbitrator dealt with the issue of procedural fairness of the third respondent's dismissal first. He found that the chairperson was biased in that after the applicant and the third respondent had closed their respective cases and after the applicant had submitted its closing arguments, the chairperson, on his own accord, called a witness, Mr Tshangana (Tshangana) to testify. In its heads of argument, the applicant conceded that the applicant's evidence regarding invoking clause 1.5 of the Memorandum of Agreement ('the MOA') went uncontested as Tshangana had not been called to testify. The chairperson's decision to call Tshangana was preceded by an exchange of correspondence between the applicant's representative and the chairperson only. The arbitrator found that by his conduct, the chairperson's irregularly assisted the applicant and found such assistance and the third respondent's exclusion from the correspondence leading to calling Tshangana as a witness, including the time at which he was called prejudiced the third respondent and rendered his dismissal procedurally unfair.

[12] When considering the substantive fairness of the dismissal, the arbitrator dealt with each charge the third respondent was found guilty of. The first charge is based on a letter the third respondent wrote on 1 April 2011. The events preceding the writing of the letter are that the third respondent was authorised by the applicant to finalise the negotiations for the purchase of the property known as the remainder of portion 2 and 20 of Hillview with Wavelengths. A deed of sale was entered into on 28 January 2011 and the price of the property was stated as R28 000 000 .00 (exclusive of VAT or transfer duty). The relevant parts of the deed of sale for purposes of the arbitration were deemed by the arbitrator to be clause 4.1 and 4.2. Clause 4.1 contained a suspensive condition which provides that the whole agreement was subject to the applicant (the purchaser) securing the purchase price from the provincial administration of the Western Cape within a reasonable period from the date of signature of the agreement. Clause 4.2 required the applicant to notify the seller's conveyancers

in writing upon securing the purchase price. On 7 March 2011, the Provincial Government of the Western Cape via its Department of Human Settlements ('the Department') and the applicant entered into a memorandum of agreement (MOA) regarding the acquisition of Land Parcel Farm Hillview NO 437 Portion 2 and 20 by the applicant. Clause 1.5 of the MOA provides that the funds allocated were subject to the Department finalising an independent valuation of the property to determine the final purchase price. In the event of the applicant receiving an amount in surplus of the Department's valuation, surplus funds had to be paid back to the Department immediately on the Department's written request. The MOA also provided that the Department would effect payment of the sum of R29, 350, 000.00 (Twenty Nine Million and Three Hundred and Fifty Thousand Rand) in one payment within thirty days of the date of signature of the MOA by both parties subject to certain conditions. Between the 30 and 31 March 2011 the Department deposited the money in the applicant's bank account when a valuation of the property at the amount of R2.1 million had already been done and forwarded to the Department. Just before the letter of 1 April 2011 was written, the seller's attorneys forwarded a letter to the third respondent enquiring as to when the purchase price could be expected.

[13] The essence of the letter of 1 April 2011 was that the third respondent advised the seller's attorneys that the respondent had received the required funds from the Province for the finalisation of the contract to purchase the land. He explained that the funds enabled him to sign all the relevant documentation with the attorneys so that transfer could take place. The arbitrator found that the false representation which formed the basis of the first charge was based more on the third respondent's failure to make reference to clause 1.5 of the MOA thus falsely representing to the seller that all the suspensive conditions had been complied with and that the money was available for the sale to be proceeded with. The arbitrator rejected the applicant's version that the third respondent had made any misrepresentation because when the letter was written the Department had already deposited the money and the seller's attorneys had made enquiries about the payment. When the Department made the deposit, it had already received the second valuation which was substantially less than the initial one. The arbitrator could find no evidence

indicating that the third respondent had been made aware of that fact when he wrote the latter of 1 April 2011. He further found that the applicant held a genuine and reasonable belief that clause 1.5 of the MOA would not be invoked. The arbitrator found that in finding the third respondent guilty of the first charge, the chairperson brought in issues which the applicant was never charged for, which did not form the basis upon which the initiator relied in presenting the applicant's case. The applicant found it problematic that the chairperson asked himself what the third respondent's motive was for paying R28 million for the property and concluded that he did not act with fidelity, honesty and integrity in respect of the R 28 million instead of concentrating on charge 1. The arbitrator also noted that the chairperson prevented the third respondent's representative on a number of occasions from dealing with the issue of the third respondent's motive in persuading the council to pay R 28 million for the property. He concluded that he was biased in favour of the applicant at the third respondent's expense.

[14] In respect of charge 3, the arbitrator noted that money deposited by the province was put in a separate account by the Chief Financial Officer, Mr Lotte (Lotte) who, owing to the applicant's poor financial position utilised it to pay the applicant's debts. He concluded that the money was used for a purpose other than the one it was deposited for, that is, purchasing the property. Evidence did not show that the third respondent was implicated. He stated that Lotte should have been disciplined for the misconduct instead of the third respondent. The arbitrator's finding was that the third respondent should have been acquitted of the third charge. He, however, added that if his finding is wrong, the charge did not justify the sanction of dismissal.

[15] With regard to charge six, the arbitrator found that the applicant should not have added it to the charges that it preferred against the third respondent as evidence revealed that work had been done on the staff establishment. The work had been submitted to the SALGBC and that the grading of the SALGBC was not accepted by the applicant. After considering the evidence and submissions in respect of charge six, the arbitrator noted that substantial correspondence between the applicant and the SALGBL indicated that the third

respondent had worked on staff establishment. As the issue of staff establishment had never been raised before, the arbitrator was of the view that charge six was included in an attempt to find as much wrong-doing as possible against the applicant. The arbitrator expressed the view that the delay in putting this charge to the third respondent indicated that it was not serious enough to warrant dismissal. He considered performance related process to have been the best action to have been taken against the third respondent.

[16] The arbitrator found that the third respondent was found guilty of charge 7 incorrectly because he was requested/mandated by the applicant's senior personnel to instruct an attorney to address a letter to the applicant and the provincial representatives who were at the applicant's premises and address their concerns. The applicant was but one of the officials who were unhappy with the interference by provincial representatives. He could not be said, based on the contents of the letter part of which was offensive, to have transgressed the MSA.

Grounds for review

[17] The applicant submitted that the arbitrator committed misconduct in relation to his duties as an arbitrator, gross irregularity in the conduct of the arbitration proceedings and exceeded his powers. The award was further attacked on the basis that the arbitrator disregarded essential evidence which included a complete break-down in the employment relationship, the third respondent's untruthfulness when giving evidence and that the third respondent was guilty of insubordination. The applicant submitted that the arbitrator's legalistic approach on the issue of procedural fairness rendered his award reviewable. The applicant also sought to rely on the arbitrator's failure to find the third applicant guilty of the acts of misconduct which led to his dismissal. The relief awarded to the third respondent was, according to the applicant in breach of section 193 (2) of the Labour relations Act 66 of 1995 ('the LRA') in that the arbitrator ordered the third respondent's reinstatement in the face of evidence that the employment relationship had broken down. The amount the arbitrator arwarded was inequitable and he ordered mutually exclusive remedies.

[18] The arbitrator rejected the third respondent's submission that Mr Gilomee (Gilomee) who was appointed as an investigator was not independent as envisaged in clause 5(3)(a) of the disciplinary regulations for senior managers. He found no substance in the explanation proffered by the third respondent that the talks that Gilomee had with the Provincial Government for appointment as an advisor for various municipalities compromised his independence.

Test for review

[19] In *Fidelity Cash Management Service v CCMA and Others*,[3] the sets for review are expressed in the following words:

> 'The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA Commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstance of the case.'

The court further held that reasonableness must be determined objectively 'with due regard to all the evidence that was before the Commissioner and what the issues before the commissioner were. The same sentiment was echoed in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others,*[4] where it was held that the reviewing court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is reasonable.

[20] It was submitted on behalf of the applicant that the arbitrator incorrectly adopted the criminal procedure approach in terms of which the third respondent's 'guilt' needed to be proven failing which acquittal in the form of reinstatement should follow. The applicant sought to rely, *inter alia*, on *Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others.*[5] It was further argued that the approach adopted by the arbitrator led him to unreasonably overlook the issue

[3] [2008] 3 BLLR 197 (LAC) at para 100.
[4] [2014] 1 BLLR 20 (LAC) at para 18.
[5] [2006] 9 BLLR 833 (LC) at 838 – 839.

of the breakdown of the employment relationship. Section 193 (2) enjoined him to consider it as he could not take a correct decision on the relief due to the third respondent without considering whether reinstatement was appropriate. The chairperson dealt with the issue of the breakdown of the employment relationship and made a finding that the employment relationship between the applicant and the third respondent had broken-down as a result of the acts of misconduct which led to his dismissal. He gave reasons for his finding. The arbitrator was required, so went the argument, to give reason for overturning the chairperson's decision on the issue.

[21] The third respondent defended the arbitrator's failure to deal with question of the breakdown of the trust relationship by submitting that it was hearsay evidence. The relationship between the third respondent and the Mayor was not necessarily one between the third respondent and the employer. The powers of the Mayor in terms of the MSA, did not extend to the assessment on behalf of the Council of the trust relationship between the Council and a municipal manager. The Mayor's perceptions of the third respondent's integrity and trustworthiness did not meet the threshold contemplated in section 193(2) of the LRA.

[22] The applicant argued that the arbitrator's failure to deal with the mutually exclusive versions before him and the third respondent's is untruthfulness constituted sufficient grounds to have the award reviewed and set aside.

[23] The essence of the applicant's argument on the unreasonableness of the decision that the third respondent was procedurally unfair was that the chairperson acted within his powers in terms of the collective agreement which governed the disciplinary enquiry when he called Tshangana as a witness. In addition, the third respondent had alleged that the applicant's failure to call Tshangana was to his detriment as he had knowledge of evidence which would exonerate him from charge 1. Tshangana was eventually called by agreement between the applicant and the third respondent.

[24] The applicant argued that the decision that the third respondent's dismissal was unfair was contradictory, unreasonable and wrong. It was based on the

arbitrator's error of disregarding admissible evidence and admitting inadmissible evidence.

[25] The applicant gave elaborate reasons for a punitive costs order against the third respondent. Section 138 of the LRA requires arbitrators to determine disputes fairly and quickly but to deal with the substantial merits of the dispute with the minimum of legal formalities. The duty is expressed as follows in *Gold Fields* (supra) at paragraph 16:

> *"In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at"*

[26] When the evidence before the arbitrator is considered in its totality, it reveals that he failed to deal with the substantial merits of the dispute before him. With regard to the first charge the arbitrator found that the third respondent held a genuine and reasonable belief that clause 1.5 of the MOA would not be invoked. He also mentioned that the fact that the seller had been given a copy of the MOA was undisputed. The arbitrator gave no reasons for his finding on clause 1.5 of the MOA. The witness who testified on whether clause 1.5 of the MOA would not be invoked was Tshangana. The arbitrator criticised the chairperson for calling Tshangana as a witness and decided to treat his evidence with caution. In making his finding, he did not deal with Tshangana's evidence at all. Although he was required to give brief reasons for his decision, he was required to deal with Tshangana's evidence which provided relevant information on whether clause 1.5 of the MOA would be invoked or not and shed light on the substantial merits of the charge. The arbitrator's omission to deal with the mutually exclusive versions before him c forms part of his failure to deal with the substantial merits of the dispute. So does his failure to deal with the appropriateness of reinstatement in the face of the chairperson's decision that a continued employment relationship would be intolerable.

[27] After evaluating evidence in connection with charge three, the arbitrator had to make a finding whether the third respondent had contravened section 32 of the

Municipal Finance Management Act 56 of 2003 (the MFMA). The arbitrator accepted that as the accounting officer the third respondent was ultimately responsible for the use of funds. Having made that observation, he finds that the third respondent was wrongly found guilty of the charge and that he ought to have been acquitted. He is not sure of his finding and add that if it is wrong it most definitely not dismissable. He adopted the same attitude when dealing with charge six. An arbitrator is decision maker, he needed to clearly determine whether the third respondent had contravened section 32 of the MFMA and section 66 of the MSA and based on his sense of fairness decide whether the applicant acted fairly by dismissing him for the contravention. His failure to exercise the authority to make decisions rendered his findings unreasonable.

[28] The arbitrator's finding that the third respondent's arbitration was procedurally unfair is not supported by the evidence before him. It is taken in total disregard of the contents of the record he was required to consider which reflects that the parties had agreed that Tshangana be called as a witness. The decision that by calling him to testify, the chairperson assisted the applicant unfairly flies in the face of the agreement.

[29] The arbitrator made serious errors that constituted gross irregularities which led him to reach an unreasonable decision. His decision to reinstate the third respondent with effect from 11 November 2012 and order that he paid in terms of the reinstatement order from the date of his dismissal, the 6 February 2012 to 1 November 2012 is a manifestation of the unreasonableness of his award.

[30] I have considered the submissions on behalf of both parties on the question of costs. The third respondent opposed this application armed with an award in his favour in an attempt to assert his rights in terms of the award. Costs orders should not be used to deter employees from opposing review applications in their favour. The third respondent did not act unreasonably in opposing this application and all the delays and inadequacies do not justify a costs order against him. Similarly, the applicant's inadequacies do not justify a costs order in favour of the third respondent.

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

1. Condonation of the late filing of the review application is granted.
2. Condonation of the late filing of the answering affidavit is granted.
3. Condonation of the late filing of the replying affidavit is granted.
4. The arbitration award issued by the Second Respondent under case number WCP031205 and dated 22 October 2012 is reviewed and set aside.
5. The matter is remitted to the First Respondent to be arbitrated *de novo* by an arbitrator other than the Second Respondent.
6. No order is made as to costs.

_____

Lallie J

Judge of the Labour Court of South Africa

Appearance

For the Applicant: Mr Conradie of Conradie Attorneys

For the Third Respondent: Advocate Ferreira

Instructed by: Mills Attorneys