REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 480/2011

In the matter between:

MEC FOR HEALTH WESTERN CAPE	**APPLICANT**
and	
NEHAWU OBO S MEYNDEKI	**FIRST RESPONDENT**
CHRIS MBILENI *N.O*	**SECOND RESPONDENT**
PHSDSBC	**THIRD RESPONDENT**

Date of hearing: 16 September 2015

Date of judgment: 12 October 2015

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator). Also before the court is an application to condone the delay in the prosecution of the review application, an application to dismiss the review application, an application in terms of s 158 (1) (c) to have the award made an order of court and an application to declare the latter two applications to constitute irregular steps.

[2] For reasons that will become apparent, I deal first with the application for review. In his award, the arbitrator held that the dismissal of Mr. Meyndeki (the employee) was unfair and that he should be reinstated. The applicant contends, on various grounds, that the award should be reviewed and set aside.

[3] The factual background to the dispute referred to arbitration is briefly the following. The employee was employed by the applicant as an emergency care practitioner until his dismissal on 3 August 2010. The employee was dismissed after a disciplinary hearing (which he did not attend) on all but one of eight charges brought against him. These charges ranged from authorised absenteeism and repeated late coming, smelling of liquor on duty, and abandoning an ambulance on the N2 freeway.

[4] The employee referred a dispute to the third respondent, the bargaining council, contending that his dismissal was unfair. On the first day of the arbitration hearing, held on 7 March 2011 (the only day on which a successful transcription of the proceedings exists), the union sought a postponement of the proceedings because it need to consult further with the employee. The application was postponed despite that fact a Mr van Zyl, the applicant's key witness, was due to

depart for the UK for three months and would be unavailable at any reconvened hearing. Following the ruling that the proceedings should be postponed, the applicant delivered an affidavit deposed to by Van Zyl, together with a covering letter recording the union's agreement that the applicant could use the evidence during the course of the arbitration proceedings. On 15 April 2011, the parties held a pre-arbitration meeting and in the course of that a meeting, they agreed that the applicant had submitted the affidavit deposed to by Van Zyl, and recorded that the question whether evidence on affidavit would be admitted with a without the right of anybody to cross-examine the person who made the affidavit, would be argued.

[5] When the arbitration reconvened on 11 April 2011, the applicant led the evidence of a Mr Thomas and tendered the affidavit deposed to by Van Zyl. The employee elected not to lead evidence, nor did he submit any documents.

[6] The arbitrator summarised Thomas's evidence in his award. This summary assumes some importance since there is no transcription of his evidence because the tape-recording went missing. The evidence of Thomas was recorded in the following terms:

> 4.1.1 The respondent's witness Mr Thomas had testified that he is the Divisional Emergency Care Practitioner Manager and that he had been employed there for six years. He previously worked for the municipality. He is based at the Metro Control Room, where activities are coordinated through the communication centre.
>
> 4.1.2 Mr Thomas further testified that he was on duty on the night of the 14th through to the morning of 15 May 2010. As a manager, he expected the optimal use of resources, including sticking to the legal speed limit, ethical patient treatment and responding on time.
>
> 4.1.3 Mr Thomas further testified that around midnight on the 14 May 2010, he received a report that the applicant did not comply with the time limits in picking up a patient from Khayelitsha to the Red Cross Children's Hospital. Ms Mabanga who works in the control room called the applicant without an answer.

4.1.4 The witness, Mr Thomas managed to speak to the applicant on the radio and told him to go to the ambulance station at Pinelands to pick up a colleague. It took Mr Myendeki about 45 to 60 minutes to get to balance from the Red Cross instead of 10 minutes. Mr Thomas also alerted Mr Jacobs at Pinelands that Mr Myendeki sounded irrational on the phone. However, Mr Jacobs did not find anything wrong with Mr Myendeki. On arrival, Mr Myendeki booked off sick.

4.1.5 Mr Thomas further testified that they received a call from the police control room about an ambulance from the Southern Division that was abandoned on the N2 freeway. He was given a cell number to contact an officer at a roadblock. Mr Thomas testified that he then phoned Mr van Zyl, the senior divisional emergency care practitioner who was Mr Myendeki's supervisor to go to the scene to check what is wrong with the vehicle.

4.1.6 Mr Thomas further testified that Mr Myendeki also phoned and told him that he was with the keys of fleet number 87 at Khayelitsha Day Hospital. He stated that Mr Myendeki was not supposed to abandon the ambulance because of the expensive equipment in it. He should stay in the vehicle as his primary responsibility until he got help because it was safe with the police around him….

[7] At this point, it should be noted that the affidavit by Van Zyl, which is part of the record and clearly served before the arbitrator and which was not the subject of challenge, corroborated Thomas's evidence ion every material respect. The arbitrator analysed the evidence and concluded that Thomas had only testified in respect of a single charge, that of smelling of liquor while on duty. He concluded that the charge of smelling of alcohol and unprofessional behaviour had not been proven since no breathalyser or urine test had been carried out. Further, he concluded that no evidence had been led in respect of the seven other charges, and that the only evidence before him amounted to hearsay. Insofar as the disciplinary hearing was concerned, the applicant had failed to provide notes of the enquiry.

[8] The conclusion drawn by the arbitrator are summarised at paragraph 5.25 of his award:

> In the premises, probabilities point to the fact that insufficient evidence was led to prove the fairness of the dismissal, such as (1) the finding of the presiding officer is ambiguous; (2) the finding does not specify for which offence Mr Myendeki was found guilty on; (3) the owner minutes of the actual disciplinary hearing; (4) the evidence of both Mr Thomas and Mr van Zyl's affidavit was based on hearsay, which is generally inadmissible and the basic procedures were not followed by the respondent, i.e. to use a breathalyser or administer blood test on the accused employee (Mr Myendeki) to determine alcohol intake or substance abuse; in my view the dismissal was not founded on a fear reason or effected with a fair procedure.

[9] The arbitrator's decision is reflected in paragraph 6 of the award. That paragraph reads as follows:

> 6.1 I, accordingly find that after all the evidence the respondent has failed to discharge the normal burden of proof that the reason for dismissal was a fair reason relating to the applicant, i.e. Mr Sivuyile Myendeki's conduct or effected in accordance with the fair procedure.
>
> 6.2 I therefore grant Mr Sivuyile Myendeki absolution from the instance.
>
> 6.3 I order the respondent to reinstate Mr Sivuyile Myendeki to the position he occupied before his dismissal and the reinstatement is retrospective to the date of dismissal without forfeiting either his salary or benefits which he previously enjoyed.
>
> 6.4 The parties must take note that this arbitration award is final and binding in terms of s 143 (1) of the LRA…

[10] The primary grounds for review are that the arbitrator erred when he granted absolution from the instance, that his findings that the ruling of the chairperson of the disciplinary hearing was 'ambiguous' and that Thomas's evidence constituted hearsay were not rationally connected with the evidence before him.

[11] I deal first with the arbitrator's granting absolution from the instance. In *Minister of Safety and Security v Madisha* [2009] 1 BLLR 1580 (LC), Basson J held that

while this court had the power to grant absolution from the instance, it was not open to commissioners or arbitrators to do so. The statutory mandate in the latter case is to determine a matter and the court held that this required that there be a final determination of the dispute as opposed to 'leaving the matter hanging in the air'. Since an arbitration award is final and binding, the court found that this is inconsistent with the possibility of reopening proceedings after absolution from the instance is granted.

[12] There are at least two difficulties with the arbitrator's award. First, he himself recorded in paragraph 6.4 his award that the award is final and binding. As the court pointed out in *Madisha*, this is inconsistent with a finding that a defendant be entitled to absolution from the instance. Secondly, it is clear from the proceedings that the first respondent elected not to lead evidence and closed its case. I fail to appreciate how a finding of absolution from the instance can be made in the circumstances. A third and related point is that the first respondent at no stage asked for absolution from the instance, or made any submissions in this regard. The first and second difficulties aside, it is not open to a commissioner to take it upon him or herself to grant absolution where a respondent party elects not to seek that remedy. An election to seek absolution is more often than not one that is carefully made, given the consequences of an order to that effect. The respondent party may well prefer to seek a final order, and commissioners an arbitrator should not deprive them of that advantage.

[13] Clearly, the arbitrator committed and material error of law by granting absolution from the instance.

[14] In any event, in my view, the arbitrator's award stands to be reviewed and set aside on account of his failure to appreciate the evidence before him and to give due weight to that evidence. The relevant principle in this regard was recently summarised by Myburgh AJ in *Shoprite Checkers v CCMA & others* (unreported) 31 July 2015) when he said of the review test in circumstances where an applicant contends that an arbitrator misdirected him or herself by ignoring material facts:

> [10] The shorthand for all of this is the following: where a commissioner misdirects him or herself by ignoring material facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable.

[15] In essence, this is the applicant's case on review - that the arbitrator ignored a host of material facts, which had the distorting effect of causing an unreasonable result. In relation 1st to the arbitrator's findings on the disciplinary enquiry, the absence of minutes of an internal disciplinary hearing does not in itself justify finding of procedural unfairness. The evidence before the arbitrator clearly disclose the disciplinary enquiry was in fact held. This was not disputed by the employee. Further, Thomas's evidence that the employee had been smelling of liquor on duty and behaving and professionally was unchallenged. Thomas's evidence was that on at least two occasions, he had a direct conversation with the employee. That evidence and the evidence that the ambulance had been abandoned by the employee was not challenged and thus served as the only version that served before the arbitrator, especially when no credibility findings were made against Thomas. In regard to the arbitrator's rejection of Van Zyl's affidavit, that affidavit was admitted and remained unchallenged given that the employee did not tender any evidence. In short, in making the decision he did, the arbitrator patently failed to have regard to the material facts it served before him. Had he considered the material facts he would in all probability of come to a different conclusion and the result of the award is therefore prima facie unreasonable. There is no basis, on the evidence that served before the arbitrator, to displace the *prima facie* case of unreasonableness, with the result that the award is unreasonable. In short, the distorting effect of the arbitrator's failure to consider material facts before him was of such a nature so as to cause an unreasonable outcome and thus a reviewable award. For all of the above reasons, in my view, the application for review stands to succeed.

[16] Turning next to the application to dismiss, the review application was filed on 5 July 2011. The incomplete record was filed on 3 May 2012. The supplementary

affidavit was filed on 22 May 2012. The answering affidavit was filed on 7 September 2014. On 1 December 2014, the bargaining council convened a meeting to attempt a reconstruction of the record. The period of delay is thus in excess of two and half years. The explanation for the delay centered on attempts by the applicant to reconstruct the incomplete record.

[17] In my view, this is one of those matter that fall to be decided by reference to the prejudice to the parties and the prospects of success in the main application. The facts indicate that the applicant will suffer substantial prejudice if condonation is not granted. Given the exposition above, the prospects of success in the review application are overwhelming. In the circumstances, the delay in prosecuting the review application falls to be condoned.

[18] There is no merit in remitting this matter back to the bargaining council for rehearing. The events that gave rise to these proceedings occurred more than five years ago and little purpose would be served by the convening of fresh arbitration proceedings. The record, such as it is, is sufficient to sustain a finding that the employee committed acts of serious misconduct, and that dismissal is an appropriate sanction. Finally, given my findings, it is not necessary for me to consider the remaining applications that serve before the court.

I make the following order:

1. The delay in prosecuting the review application is condoned.
2. The arbitration award issued by the second respondent is reviewed and set aside.
3. The second respondent's award is substituted by the following:

   'The applicant's referral is dismissed'
4. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv R Nyman, instructed by the state attorney

For the first respondent: Adv L Makua, instructed by MPM Attorneys