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IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C1111/2018

In the matter between:

WISEMAN GABAVANA

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

COMMISSIONER LILLIAN GOREDEMA

Second Respondent

CITY OF CAPE TOWN

Third Respondent

Date heard: 5 November 2020

Date delivered: 26 January 2021 by means of scanned email

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration award under case number WCM021805. The second respondent (the arbitrator) found the dismissal of the applicant to have been procedurally and substantively fair. The review was case managed by this Court in the course of which the applicant's representatives were appointed pro bono. In these circumstances, I am granting condonation for any deviations from time periods in terms of the rules.

[2] The applicant was employed by the third respondent (the City) as an Assistant Professional officer whose core duty was to facilitate adult education and training. He commenced permanent employment on 1 July 2011. On 20 November 2017, he received notice of the following charges:

"1. MAIN CHARGE

1a) You misconducted yourself in that you were grossly insubordinate/insubordinate when you defied/failed to comply with a final instruction from your Line Management to comply with submitting a workbook by 30 September 2017, following numerous previous attempts from your Line Management for you to comply Your persistent non-compliance with Line Management's instruction is seen as an act of defiance which made the employment relationship intolerable.

1.1 Alternatively:

You misconducted yourself in that you were grossly negligent/negligent when you failed to submit a workbook by 30 September 2017 as required by your Line Management. Your persistent failure to submit the workbook is a cause of serious concern which impacts negatively on the employment relationship."

- [3] On the 23 January 2018, a disciplinary hearing was held. In a report, signed by the Chairperson on the 29 January 2018, it is indicated that the applicant was found guilty of Charge 1. The reasons for the finding are given as the following:

"Based on the evidence it was quite clear that Mr Gabavana understood that a workbook formed part of learning material, although he did not admit it. Further, he is suitably qualified and experienced to develop learning material, as he is an author and an AET Facilitator at professional level. Despite numerous instructions from various levels of management to submit the workbook since 2014, he has failed to do so. These instructions were reasonable and his reasons for not submitting the workbook are unacceptable."

- [4] The applicant was summarily dismissed on the 29 January 2018. It appears from the record, that he left the disciplinary proceedings before he was cross-examined or could give reasons in mitigation. The record before the Arbitrator contains a statement from a psychiatrist dated the 30 January 2018, a day after the disciplinary, from psychiatrist, Dr Chris George which reads as follows:

"To Whom it Concerns

Confidential

Re: Mr WISEMAN GABABANA ID66[....]

Mr Wiseman Gababana has consulted me for treatment of depression since

October 2012. On 25 October 2017 he consulted me with symptoms of a depressive relapse reactive to work-related stress; and he consulted me again on 29 November 2017 with a continuation of depressive symptoms as a result of stress that he was experiencing in his work situation.”

[5] The letter was contained in the applicant’s bundle at arbitration. In his argument before the Arbitrator at the close of the proceedings, the applicant stated that matters he had taken up with his employers regarding plagiarism, victimization and the development of a Xhosa Workbook, “affected his health conditions”. I return to this issue.

[6] In her analysis of the evidence before her, the Arbitrator found *inter alia* as follows:

“67. The Applicant alleges, in his closing statement, that he was dismissed because of victimization, raising issues of plagiarism and not compiling a Xhosa workbook.

68. This is inaccurate as the Applicant was found guilty of gross insubordination in that he failed to comply with a final instruction from his Line management to submit a workbook by 30 September 2017 after numerous attempts had been made for him to comply.

69. It was not disputed by the Applicant that he was given an instruction to compile a workbook first by Ms Meth and by the manager Ms Ntubane.

70. The issue I have to decide is whether the instructions was lawful and reasonable.

71. I accept the evidence of both Ms Meth and Ms Ntubane that they instructed the Applicant to compile a Xhosa workbook and that the instruction was lawful and reasonable. I accept their evidence that there was nothing unlawful about the instruction as it was part of the Applicant’s job content. The Applicant was expected to develop learning material and he was deemed to be competent to do this due regard being taken that the (sic) had a Diploma in Higher Education He had refused to complete the ODE training and he admitted using Dingi’s workbook.

72. Whilst the Applicant wants me to find that it was necessary for him to be trained to compile a workbook he failed to provide evidence to prove this. He

even admitted in his testimony that he did not know of any training institution who provided such training confirming that such training was not necessary.(emphasis mine)

73. The Respondent presented evidence was that the Applicant's colleagues had compiled workbooks without any specific training as confirmed by Knowledge and he did not dispute this safe to say it was plagiarized. If indeed the workbooks were plagiarized he did not explain why he would use a plagiarized work book if he felt that it was unnecessary. He also did not dispute that the Office of the Public Protector's report dated 13 July stated that the allegations of plagiarism would be addressed by management which was done as Ms Methi testified that the Harvard referencing had been used but this was not plagiarism. It is therefore unfortunate that the Applicant persisted with his allegations of plagiarism in his closing statement which had no relevance to his defiance of a lawful and reasonable instruction. He was not instructed to plagiarize and he did not say he would like to be instructed in correct referencing when the instructions was given to him."

[7] The applicant's founding and supplementary affidavits set out certain grounds of review. He submits that that the Arbitrator committed a gross irregularity in failing to take *inter alia* the following into account:

- 7.1 His evidence that writing a Xhosa workbook requires special expertise;
- 7.2 His evidence that to obtain that special expertise a person would need to undergo training and instruction from an expert in Xhosa education;
- 7.3 His evidence that that he is not qualified to write or develop a Xhosa workbook and that material development was not the focus of his diploma;
- 7.4 The copyright and/or plagiarism considerations relevant to publishing educational materials;
- 7.5 His evidence that even though he did not write or develop a Xhosa workbook he still developed learning material, in a broad sense, for his isiXhosa class.
- 7.6 That in finding that the Applicant defied an instruction to compile a workbook from 2014 until 2017, she ignored that his failure to do so was

not defiant but due to his sincere and honest belief that he was not qualified to do so which he communicated as politely as possible to them;

- 7.7 That his failure to write the workbook raises a question of capacity rather than misconduct;
- 7.8 His evidence that the only reason he used Ms Memenza's workbook on occasion was because he was instructed to.
- 7.9 That issues of victimization and plagiarism were the cornerstones of his unfair dismissal.

[8] From a consideration of the record, the evidence referred to above was given by the applicant. I note that the Arbitrator despite this evidence, appears to have been focused simply on whether the applicant did not obey an instruction. She, refused to take into account, or even hear, that the applicant was achieving an 80 per cent pass rate with his adult learners who came to the classes because they could not read or write. When this evidence arose during the cross-examination of Ms Ntubane, the Arbitrator intervened as follows addressing the applicant's representative:

"COMMISSIONER: Stop, I am not interested in this conversation now. Please, you are all getting excited, he was passing 80 per cent, I'm not – he is not charged by – for people not passing, please it's a workbook. Witness has said he'd refused, you are saying he did, if that is over now, you must say okay I'm done, so I can go and make a decision and make a decision after he gives evidence."

[9] When applicant's representative asked the applicant why he thought the instruction to compile a workbook was unreasonable the following bears recording:

"W. GABAVANA: Because...this program of adult education and training within the City of Cape Town, we are under the umbrella of education When we facilitate, we get the materials from the Department of Education and when they write their exams, they write their exams from the Department of Education, so it was very important to adhere with the material from the Department of Education, let alone the creativity of the facilitator to take the extra material to

–to-to empower more learners. But is the Department of Education gives us material to teach, and then there are also relevant material to teach, why must I develop my own material? There are workbooks that are being ordered by the Department – by our section, there are workbook that are being ordered from the – from the service provider, for an example this one from the Media Works and the – the –the materials from the Department of Education we get it. Why are we developing our own material whereas we are not accredited to develop it because the question that I have been interested to know after I develop this workbook who qualifies it to see it is relevant-

COMMISSIONER : Hey – where are you going? Hello –hello-hello where are you going? This is not a free for all! You are just answering a question, don't lecture us on what should have happened and what should happen, come back.”

[10] The failure to take relevant evidence into account was in the Court's view a result of the Arbitrator being intent on being blinkered to all the relevant circumstances of the case she was called upon to arbitrate. This included the evidence going to the issue of incapacity, the medical note referred to in paragraph 4 of this judgment, and other documentary evidence before her regarding the repeated stress the applicant suffered. All of these factors including the applicant's level of performance in the core duties of his job are facts and circumstances that should have been considered by her in making her ultimate Award that the dismissal was substantively fair.

[11] Although the applicant did not raise the issue of irregularities and misconduct on the part of the Arbitrator, I am in agreement with the sentiments expressed in **ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No & others**¹ that the Labour Court may take cognizance of same given its role vis a vis the CCMA:

“[38] The Labour Court fulfils this supervisory function irrespective of what the applicant party in the review application may raise as grounds of review. However, and to ensure that the policy consideration that the Labour Court should be mindful not to over-supervise the CCMA, as said in the judgment in *Pep Stores*, is not negated, the Labour Court should only intervene in terms of its general supervisory functions if it is apparent from the record before the court that one of the specific grounds as listed in s 145(2)(a) of the LRA actually

¹ (2013) 34 ILJ 2347 (LC)

exists, as the existence of any one of these three specific considerations must surely be entirely incompatible with any arbitration proceedings that would be considered to be lawful, reasonable and procedurally fair...”

[12] In this regard, I wish to record the following exchange between the arbitrator and the applicant:

“COMMISSIONER: Okay. I have got just a few questions for you. You admit that you were given an instruction, to do a workbook?

W GABAVANA: Yes, Commissioner.

COMMISSIONER: You understand what a workbook is?

W GABAVANA: I don’t understand Commissioner completely, hence I wanted to be trained.

COMMISSIONER: Ja, but if I don’t understand something, I can’t say train me when I don’t even understand it. The impression I got throughout was you don’t understand what a workbook is, am I right or wrong?

W GABAVANA: I don’t – yes <inaudible: 06:31:49>

COMMISSIONER: Ah okay, alright. After receiving the instruction you didn’t say explain to me what a workbook is, you said: I want training. On top of that, you go and write three pages and say this is my workbook, what was that about?

W GABAVANA: That was the effort to show that I take the instruction from the management.

COMMISSIONER: But instructions that you don’t understand Mr Gabavana. Understand that I don’t ask questions that you are asked by him or her because I –

W GABAVANA: No – no because they said –

COMMISSIONER: Must decide

W GABAVANA: They said Commissioner, I must – I must show commitment, that I want to do this.

COMMISSIONER: I show commitment for something that I don’t understand? How does that work? Okay, I am not going to continue with that. Then, you obviously understood what a workbook is, and I will tell you why, you went and took Dingi’s workbook and started using it in class, it’s a workbook – it’s Dingi’s workbook. Do you understand what a workbook is then? From Dingi’s?

W GABAVANA: Before – before I used Dingi’s workbook, Dingi would sit down with me and explain to me his workbook.

COMMISSIONER: You are not understanding my question, just answer my question, I don’t want to go on a round about, cause there is a reason why I asked those questions okay, so he explained to you, so you understood what a workbook is! Couldn’t you have asked Dingi to assist you in compiling a workbook without being trained? Because Dingi had done it.

W GABAVANA: Commissioner we are dealing with education, I was fearful to be trained by someone who is not trained to develop a –

COMMISSIONER: Not trained but you are not fearful to use his workbook in class. Okay. How does it work that you think an instruction is unlawful, is unreasonable relating to a workbook and then you go and take another person’s workbook and use it, how does that work?

W GABAVANA: Can you repeat what you are saying, please?

COMMISSIONER: You are saying – yes I will repeat there is no need for you to beg me, I will tell you, because here you are not a beggar you are a human being, you are saying that: I don’t want to be trained – I don’t want to do a workbook without training, it’s unlawful, it’s unreasonable, it’s inconsistent right? But at the same time you go and take another colleague’s workbook, that is according to you: unlawful, unreasonable and what – how does that work? How do you draw the line that okay this workbook is – is – is – Dingi – is – is – okay but not me, how does that work?

W GABAVANA: I have been fearful Commissioner because I have been viewed as if I don’t have instructions hence I told myself I must use that workbook because I don’t want to be viewed as if I don’t have instructions.

COMMISSIONER: But in your mind you thought ugh – ugh – this is unlawful. Is that what you telling me? I am fearful because I will be termed a rebel but <inaudible: 06:35:18> Dingi this is unlawful, is that what you are telling me?

W GABAVANA: No, I used it although I knew that –

COMMISSIONER: Okay, uhm...you understand what the charges were? You do?

W GABAVANA: Yes.

COMMISSIONER: That you were given an instruction and failed to follow the instruction, do you understand – the charge?

W GABAVANA: But my failure was based –

COMMISSIONER: I never asked you that question, answer my question. I said do you understood the charge, that you didn't follow an instruction?

W GABAVANA: Yes.

COMMISSIONER: And then after that, because you explained to the people that you were talking to that I am very unhappy, I haven't had written training, did – was there any follow up by the department on that training issue at all?

W GABAVANA: No.

COMMISSIONER: What about the emails that were sent to you? Were – was that not following up? How do you...how do you consider those to be – I am not saying it was satisfactory according to you, but did the department follow upon the issue of training as you had raised it?

W GABAVANA: When – when – when I attempted and I sent this email I was expecting that the management is gonna send me an email and say we expect you to do it this way but they never responded.

COMMISSIONER: That did not happen and we know that. But, I am saying the evidence here is that Knowledge was sent to go and train and assist you and you said no, no, no, no, no – I want a certified institution, they say okay, what certified institution do you want? And today you say no, I didn't know. I am not asking you to answer my questions, I am just telling you what you have said, ja. I didn't know any institution. Your manager says, I am expecting you to do a, b, c, d and you say no, no, no, no – I need certified training. When you do that, what outcome do you expect? Is that not complying with any instruction? Is that not insubordination in your world? I genuinely ask because I want to know your feeling, I don't want Hearne² to be in here, I want you to answer!

W GABAVANA: Okay, I don't think Commissioner I was insubordinate because of the try that I've – I've – I've put to show that I want to develop this workbook, but I want to be assisted.

COMMISSIONER: From 2014? One issue? Is the department not justified at the end of the day to say no man we are not going anywhere, let's

² Hearne was representing the applicant

just deal with this the way of discipline, did you hear my question? Don't answer if you think you didn't.

W GABAVANA: Okay can you repeat it?

COMMISSIONER: Is the Department justified in bringing disciplinary charges against you for not following instructions from 2014?

W GABAVANA: I doubt it Commissioner that I didn't follow the instructions, I did follow the instructions.

COMMISSIONER: You did not, you've just said I couldn't because I did not receive training are you changing your mind now?

W GABAVANA: No, no by attempting, by attempting – by attempting to make these three pages, to say – because they are supposed to see okay this is what he has done, and these alphabet a, b, c, d, e, f is to show that I am teaching the people who can read and write – who cannot read and write, and so I thought they were going to assist me based on this.

COMMISSIONER: Okay, so if I say to someone: I don't understand this, then an email comes which totally ignores that, what do I do? Do I sit and say okay you ignoring me or I say but you haven't answered me, have you received the three pages? What is your comment on the three pages, did you do that?

W GABAVANA: No, I didn't do it in writing, I did it in verbal."

[13] The above conduct by the Arbitrator does not reflect an inquisitorial approach permitted in terms of section 138 of the LRA. She descended into the arena and cross-examined the applicant as if she was his adversary. Such misconduct manifestly cannot allow a fair trial of the issues and in addition gives rise to an apprehension of bias.

[14] Even if I am wrong to include the arbitrator's misconduct in coming to my decision, I am of the view that the gross irregularities relied on by the applicant must be understood to be of the nature that render the outcome of the award unreasonable, in that the Arbitrator manifestly failed in applying the **Sidumo** principles and did not make an objective assessment of all the relevant facts and circumstances presented at arbitration, in coming to her decision on whether dismissal was the appropriate sanction. Had she done so, she would have found that dismissal was too harsh a sanction given the following:

- 14.1 That the applicant had performed his core duties to a high level during his employment;
- 14.2 That his relationship with his line managers may have been better treated as an incapacity dispute given the evidence of his line managers on record that their relationship with applicant was difficult from the outset;
- 14.3 That he was suffering from depression from 2012 and that should be considered as a mitigating factor in the de novo hearing before the arbitrator;
- 14.4 That there were problems regarding the workbooks recognized by the employer given that referencing was initially excluded;
- 14.5 That the legal considerations in relation to copyright and allegations of plagiarism were genuine concerns of the applicant;
- 14.6 That specialist training in compiling a Xhosa workbook was a legitimate issue raised by the applicant.

[15] The Award is susceptible to review. I am of the view that it is interests of both parties that the dispute not be remitted to arbitration. The record is clear that the Applicant does not want to be reinstated. A further arbitration will only exacerbate the incapacity considerations which are evident from the Record, and not bring finality to this case for the employer. I am of the review that a costs order is not apposite in this matter. The third respondent was entitled to defend the Award in its favour in this court. I am grateful to the applicant's legal representatives for taking on this matter pro bono to assist the Court.

[16] In the circumstances, I am of the view that the applicant should be afforded compensation by order of this Court. I make the following order:

Order

- 1. The Award under Case Number WCM021805 is reviewed and set aside and substituted as follows:
 - 1.1 The dismissal of the Applicant was procedurally fair but substantively unfair.
 - 1.2 The Third Respondent is to pay an amount of compensation to the Applicant equivalent to nine months of his gross salary at the date of his dismissal, less statutory deductions.
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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

For the Applicant: M.R. Townsend instructed by Bagraims Attorneys

For the Third Respondent: N. Mbangeni instructed by Lewendal Inc