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

Reportable
C188/2020

In the matter between:

STELLENBOSCH MUNICIPALITY	Applicant
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	First Respondent
W RIEKERT N.O.	Second Respondent
GERAL ESAU N.O	Third Respondent
MATUSA obo R. ANTHONY	Fourth Respondent

Date heard: Postponed on the 12 February and 18 March 2022 and argued on 14 April 2022. Judgment delivered by email: 13 June 2022; Deemed received at 10.00hr on 14 June 2022

Summary: Application for condonation and review of Appeal Ruling under section 158(h) of LRA and of an Award under section 145 of LRA; Both applications set down for hearing; Municipality proceeded to argue only on section 145 condonation and review applications;. Application for condonation granted taking into consideration good prospects of success in the review. Review of the award granted in as far as the remedy of reinstatement was concerned; Sars v CCMA (Kruger) 2017 (1) SA 549 (CC) (2017 (2) BCLR 241;

[2017] 1 BLLR 8; [2016] ZACC 38) and Moodley v Department of National Treasury & others (2017) 38 ILJ 1098 (LAC) followed.

JUDGMENT

RABKIN-NAICKER J

[1] The Applicant came to court to seek the following relief:

1.1 an order reviewing and setting aside the Third Respondent's Internal Appeal Ruling dated 31 July 2018 (the Appeal Ruling);

1.2 an order condoning the Applicant's failure to launch an application for review of the Appeal within a reasonable period of time;

1.3 an order reviewing and setting aside the arbitration award issued by the Second Respondent on 6 December 2019 (received on 9 December 2019) under the auspices of the Bargaining Council (the Award), and

1.4 an order condoning the delay of 18 weeks in launching the application for review of the Award.

[2] Ms Revonah Anthony (Anthony) was employed by the Applicant (the Municipality) in February 2006 as a "leierhand". At the time of the termination of her employment she held the position of Process Controller.

[3] On 19 March 2018, Anthony was advised that the Municipality was going to institute an inquiry into allegations of misconduct against her. These were:

3.1 Dishonesty in that she had misrepresented that she held a matric certificate when she did not; and

3.2 Producing a falsified document (purporting to be a matric certificate) to the Municipality Controller.

[4] She was charged with gross misconduct and violating the Code of Conduct established for and applicable to all employees of the Municipality in terms of Schedule 2 to the Local Government Municipal Systems Act, 32 of 2000 (the Municipal Systems Act) which in terms of Item 2 (b) of the Code provides that: "A staff member of a municipality must at all times perform the functions of office in good faith, diligently and honestly."

[5] Both the disciplinary proceedings and the appeal were conducted in terms of the Disciplinary Procedure Collective Agreement concluded in the first respondent (the bargaining council) of which the Municipality is a member.

[6] Anthony was found guilty of the allegations of misconduct against her and she was dismissed in a ruling dated 13 June 2018. She appealed the sanction of dismissal and the third respondent (the presiding officer in the appeal) found that while she was guilty of the complaints against her, a final written warning operative for 12 months with salary increments withheld for a period of a year, would be a more appropriate sanction. He took into account her personal circumstances and her submissions regarding stress and depression she had experienced. He ordered that she be reinstated and she was allowed to return to work on the 1 August 2018.

[7] On the 16 October 2018, the Municipality informed Anthony of its decision to uphold the original dismissal order by the disciplinary chairperson on 13 June 2018, subject to a consideration of any representations made by her. After considering the representations made by MATUSA on her behalf, the Municipality took a decision to uphold Anthony's dismissal with effect from 31 October 2018.

[8] In the wake of an interpretation dispute referred by MATUSA to the bargaining council, concerning the interpretation and application of the Disciplinary Procedure, an arbitration award was issued on the 31 July 2019. This found that in dismissing Anthony on 31 October 2018, the Municipality had acted in contravention of clauses 17.10 and 17.15 of the Disciplinary Procedure collective agreement which provides *inter alia* that:

> "17.10 The Presiding Officer of the Disciplinary Appeal Hearing shall have the power to confirm or set aside any decision, determination or finding and to confirm, set aside or reduce any sanction imposed by the Presiding Officer of the Disciplinary Hearing
>
> …….
>
> 17.15 The determination of the Presiding Officer of the Disciplinary Appeal Hearing cannot be altered by the Municipal Manager or any governing structure and shall be final and binding on the Employer subject to any remedies permitted by law."

[9] In addition to the above interpretation dispute, MATUSA referred an unfair dismissal dispute to the Bargaining Council and an Award penned by the second respondent, dated 6 December 2019 (now sought to be reviewed), found that the dismissal of Anthony was unfair, and ordered her reinstatement in to the same or similar position that she occupied prior to her dismissal, together with back pay.

[10] In written submissions on the day of the hearing before me, the Municipality made what it described as its 'core submissions'[1] focusing on the condonation and review applications relating to the Second Respondent's Award only, and submitting that:

> "….the internal appeal ruling is moot. This document aims to assist the Court, as the Applicant departs significantly from its founding papers and Heads of Argument."

[11] The Municipality did not depart from all grounds of review in its founding papers. However it relied only one ground contained in paragraph 26.1 of the founding papers conceding that this one was the only ground that is good in law. The paragraph reads:

[1] These were read and considered by the representative of the Fourth Respondent before the hearing commenced.

"26.1 In the first instance, the Commissioner failed to properly consider the gravity, nature and extent of the misconduct committed by Anthony and that in such circumstances a finding of reinstatement would be wholly inappropriate."

[12] The Award in question reads in material part as follows:

"25. The employer's only remedy is, as mentioned by Mr Stone on 31 July 2019[2], to have the ruling or the presiding officer of the appeal hearing reviewed by the labour court rather terminating the employee's services in breach of the DPCA.

26. As the employer's actions, on 16 October 2018, in calling on the employee to state why she should not be dismissed, were in breach of the DPCA this arbitrator is bound by those provisions of the DPCA and is not entitled to consider whether the employee's dismissal on 31 October 2018 was substantively fair.

27. Having considered the evidence before this arbitration hearing it is decided that what the employer had done by unilaterally dismissing the employee on 31 October 2018 is not permitted by the DPCA and is for that reason unfair. She must be reinstated in the position or similar position that she held at the time of her dismissal and on the same terms and conditions of employment e.g. the conditions set by the presiding officer of the appeal hearing.

28. Regarding the employer's argument that this arbitration hearing is a fresh hearing: as the employee's dismissal is in violation of clause 5.2 read with clause 17.15 of the DPCA this arbitrator may only so determine. As explained above only the labour court has the powers to set aside the presiding officers of the appeal hearing decision."

[2] Commissioner in the Collective Agreement interpretation Award

[13] It is submitted on behalf of the Municipality that it is beyond dispute that the Commissioner held the dismissal to be unfair by virtue of the invalidity of the 31 October 2018 dismissal, and ordered reinstatement not because he had considered whether it was appropriate to do so, and concluded that it was, but because he believed that the invalidity of the dismissal automatically resulted in her reinstatement.

[14] Essentially, what the Municipality submitted before me, was that it remains open to this Court in the circumstances of this case, to "set aside the order of reinstatement" contained in the Award, *qua* remedy for the unfair dismissal.

Evaluation

[15] In **Moodley v Department of National Treasury & others**[3] the LAC was seized with a case in which an arbitrator had applied 16B of the PSA that provided that the employer could only execute the decision of the chairperson and not change or amend it, and found that the unilateral decision of the employer to change the chairperson's decision after the employee had elected to be demoted, rendered the employee's dismissal unfair. The LAC considered its decision in **Kruger v SARS** and the appeal against that decision in the Constitutional Court[4] and stated as follows:

> "[25] The employer (SARS) in Kruger unsuccessfully challenged the arbitrator's decision in an application for review in the Labour Court. The employer then appealed to this court. This court, referring, inter alia, to County Fair Foods and Chatrooghoon confirmed the Labour Court's decision and dismissed SARS' appeal.

[26] Sutherland JA writing for this court in Kruger stated:

'The established law about an employer being disallowed from interfering in the outcome of a disciplinary enquiry where the chair has the power to make a final

[3] (2017) 38 ILJ 1098 (LAC)
[4]South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others (2016) 37 ILJ 655 (LAC); SARS v CCMA 2017 (1) SA 549 (CC) (2017 (2) BCLR 241; [2017] 1 BLLR 8; [2016] ZACC 38)

decision, which is the crucial issue in this appeal, has as its aim the protection of workers from arbitrary interference with discipline in a fair system of labour relations. The principle is worthy of preservation.'

[27] *That was the state of the law on the topic at the time leave to appeal in this matter was dealt with. In the interim, the employer in Kruger appealed to the Constitutional Court.* (emphasis mine)

[28] The Constitutional Court gave judgment in that matter on 8 November 2016. Granting the employer leave to appeal this court's decision, the Constitutional Court, in effect, reversed this court's decision in the matter. While the Constitutional Court seemingly accepted that the commissioner in Kruger could have concluded that the dismissal was unfair, because of the substitution of the sanction by SARS and in circumstances where the employee was not granted a hearing before the dismissal, it held that having made such a finding, the commissioner was, nevertheless, enjoined by the law, namely s 193(2) of the LRA, to determine whether the employer was to reinstate or re-employ the employee and the commissioner could only order reinstatement in the circumstances set out in s 193(2).

[29] The section provides that the Labour Court or arbitrator (which includes a CCMA commissioner) 'must require the employer to reinstate or re-employ the employee unless — (a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure'.

[30] The Constitutional Court in Kruger held that the commissioner had failed to make the s 193(2) determination and had in fact ignored and had failed to take into account evidence that the reinstatement or re-employment of the employee would be intolerable and that the failures were unreasonable. Mogoeng CJ, writing for a unanimous court, stated:

‘After concluding that Mr Kruger’s dismissal was unfair, the arbitrator immediately ordered his reinstatement without taking into account the provisions of s 193(2). She was supposed to consider specifically the provisions of s 193(2) to determine whether this was perhaps a case where reinstatement is precluded. She was also obliged to give reasons for ordering SARS to reinstate Mr Kruger despite its contention and evidence that his continued employment would be intolerable. She was required to say whether she considered Mr Kruger’s continued employment to be tolerable and if so, on what basis. This was not done. She does not even seem to have considered whether the seriousness of the misconduct and its potential impact in the workplace, were not such as to render reinstatement inappropriate and those are the key factors she ought to have considered before she ordered SARS to reinstate Mr Kruger.’”

[16] The approach of the Constitutional Court in **SARS v Kruger** was approved in considering the merits in **Moodley**, with the LAC stating that:

> “[32] As regards the merits, Ms Moodley’s legal representative tried to distinguish the present matter from that of Kruger on the basis that here there was no evidence at all placed before the arbitrator. The parties had defined the issues and by agreement had only dealt with the matter by way of argument. Ms Moodley’s counsel submitted that the chairperson’s sanction was in line with para 7.5.18 of the department’s employee relations guidelines — which the chairperson had also referred to in her sanction and in the clarification of the sanction. Ms Moodley’s legal representative also continued with an attack on the court a quo’s judgment on the procedural issues.
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> [33] I will deal with the procedural attack later. In respect of the merits, it is apparent from the arbitrator’s award that he or she did not refer at all to s 193 of the LRA. Like the arbitrator in Kruger, she, or he, does not even seem to have considered whether the seriousness of the misconduct and its potential impact in the workplace, were not such as to render reinstatement inappropriate. The arbitrator’s failure to do so, in circumstances where she,

or he, was legally obliged to do so, is justifiably criticised as being unreasonable and as a failure to apply his or her mind to the issues."

[17] I note that in the matter of **Moloantoa v Commission for Conciliation, Mediation & Arbitration & others**[5]**,** my brother Moshoana J, regarded himself bound by the reasoning of Sutherland J in the Kruger v SARS matter (supra). I am respectfully of the view that this is not the case given the dictum in **Moodley** above.

[18] The Municipality did not address the Appeal Ruling review and the application for condonation in relation thereto, submitting that if the Court was persuaded by the approach outlined above, the Appeal Ruling was moot. If I accept the authority referred to above, in the circumstances of this case, that is correct. The implication thereof is that this Court in reviewing an Award brought under section 145, can make a determination that interferes with an Appeal Ruling of the type *in casu*, to the extent of deciding what the appropriate remedy for an unfair dismissal is in the circumstances of the case. This is now the remedy permitted by law in relation to the collective agreement at the heart of this dispute.

[19] The issue of condonation is however not a simple hurdle for the Municipality. The explanation for the delay of more than 4 months after the permitted six week period, is extraordinary in certain respects. It is as follows:

> 19.1 The Municipality became aware of the Award on 9 December 2019. The application for review was due before on the 20 January 2020. It avers that it does not currently have attorneys appointed on a permanent basis. Attorneys are appointed pursuant to a formal tender process where an estimated amount of legal costs is higher than R200 000. As at 9 December 2019, that Applicant had no panel of legal representatives from which a choice could be made and it was necessary to go through a formal tender process to appoint legal representatives for this case which normally takes about three months.

[5] (2021) 42 ILJ 2259 (LC)

19.2 The Municipality does not commence tender processes between the period middle December to middle January. The reason for this decision is to make sure that no service provider or member of the public is prejudiced during the period regarded as a man holiday period for businesses and staff. It is very difficult to properly and timeously take all the necessary steps set out in the supply chain process when responsible officials are on leave at different times throughout the festive period, and attorneys' firms general shut down for the festive period by mid-December to approximately mid-January. During this time, according to the Municipality service providers may complain that they could not participate in the process as they were closed or did not see the advert.

19.3 The relevant Municipality officials then recommended taking the matter on review by the end of January 2020. It is averred that one Williams who is the responsible official within the Applicant's legal Department was on annual leave from 14 to 27 January and the appointment of an external legal advisor could not be easily effected without his involvement as he needs to draw up the specifications for the appointment tender". It then took until the 10 March 2020 for the Municipality's attorney of record to be appointed. The details of queries between officials, formal quotation and authorization for deviation from the supply chain process are provided.

19.4 There follows an explanation regarding the period between 10 March and 4 June 2022. This involves the Covid lockdown and the lengthy indisposition of the attorney who was given the instruction at Fairbridges, until 13 May 2020.

[20] It must be said that the explanation for the Municipality's delay is far from reasonable. It is hardly a small concern *qua* employer. As was submitted by Mr de Brynn on behalf of MATUSA, it could certainly have speeded up its processes in terms of its own policies. The Municipality's excuses regarding relevant officials being on leave would seem to suggest there are no delegations in place. It is also a fact that there is no evidence given as to the Municipality following up with the firm of attorneys to ensure the filing of papers was done as quickly as possible. The firm in

question is also well established. No explanation is offered as to why another attorney could not have stepped in to complete the necessary work.

[21] It was argued on behalf of Anthony that the explanation for the delay of more than four months was unreasonable and it was not necessary for the Court to look at the prospects of success in determining whether condonation should be granted. If the Court should consider the prospects, it should be alert to the fact that the **Kruger** facts were distinguishable in that the racist behavior at issue in that matter was intolerable. In this case, Anthony was reinstated for three months and it could not be said that her continued employment was intolerable.

[21] For the Municipality, it was averred that falsely representing that she had a Matric certificate *on two occasions* (which Anthony admitted to at the disciplinary hearing) was completely destructive of the relationship of trust between herself and the Municipality. I note that in his Award, the Second Respondent was apprised of the findings of the disciplinary chairperson and of the Third Respondent, and heard viva voce evidence. The second respondent did not consider this evidence precisely because he was of the view that he could not make a finding on the substantive unfairness of the dismissal. In other words, the evidence to embark upon a section 193(2) enquiry served before him.

[22] It falls to this Court to decide firs, whether to grant condonation for the late referral of the review, and secondly if so, whether it should set aside the Award in question in so far as the remedy to be afforded to Anthony is concerned. I do find in this matter that despite the unsatisfactory explanation for the substantial delay in filing the review, that it is incumbent on this Court to take what are good prospects of success into account. As the LAC in **Moodley** succinctly stated:

> "[47] It is trite that condonation requires the exercise of a discretion in deciding whether good or sufficient cause has been shown for the failure to comply with the rules. The discretion has to be exercised judicially, taking into account all relevant facts and circumstances, but, in the final analysis, it is a matter of fairness requiring the balancing of at least the following factors: the degree of lateness, the explanation for the delay, the prospects of

success and the importance of the case. A slight delay and a good explanation may make up for weak prospects of success and on the other hand, the importance of the issues and good prospects of success may make up for a long delay."

[23] I have considered the prejudice that has been caused to Anthony given the history of the dispute, more especially the less than professional way the Municipality has dealt with it. I have also taken into account that the explanation for the delay is wanting and the prospects of success are strong. In my view, the case must be regarded as important. Upholding the requirements of the Code of Practice of Municipal Employees in respect of their duty to act honestly is in the public interest. I therefore exercise my discretion to grant condonation for the late filing of the section 145 review.

[24] Having granted condonation, I consider that it is appropriate, in line with the jurisprudence referred to in this judgment, to review and set aside the Award in question, *in as far* as it orders the reinstatement of Anthony. The falsification of a matriculation certificate is an extremely serious offence and there is no doubt that objectively, such conduct leads to a breach of trust in the employment relationship. The Commissioner should have taken this into account and he was incorrect in law to find that he could not consider substantive fairness.

[25] However, I do take into account the procedural unfairness of Anthony's dismissal which arose due to the Municipality's disregard of the collective agreement to which it was bound and am of the view that Anthony must be compensated. The unnecessary delays in bringing this matter to Court, (the delay in regard to the section 158(1)(h) review was excessive), and the abandonment of the 158(1)(h) review on the day it was to be argued, is also taken into account, as far as a costs order is concerned. I therefore make the following order:

Order

1. Paragraphs 31 – 33 of the Award under case number WPC 111804 are reviewed and set aside, and substituted as follows:

"Ms. R Anthony must be paid compensation for her unfair dismissal in an amount equivalent to 10 months of her salary at the time of her dismissal."

2. The Municipality shall ensure that such compensation is paid by no later than 15 Court days of receipt of this Order.

3. The Municipality shall pay the costs of both reviews and condonation applications set down for hearing before this Court.

4. Each party is to pay their own wasted costs occasioned by the postponements on the 16 February and 18 March 2021.

H. Rabkin-Naicker
Judge of the Labour Court of South Africa

Appearances
Applicant: Elisna Tolmay instructed by Fairbridges Nertheim Becker
Fourth respondent: Hannes Pretorius Bock & Bryant