Not reportable/of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case No: JR 2434/19

In the matter between:

MBUSO THENJWAYO **First Applicant**

WALTER REMMEGO **Second Applicant**

and

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **First Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Second Respondent**

ZANDILE MPUNGOSE **Third Respondent**

Date of Set Down: 12 October 2023

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 15h00 on 19 October 2023.

Summary: (Review – dismissal – misconduct during a grievance hearing and other charges – Arbitrator misstating legal principles and failing to analyse substantive fairness – Arbitrator dismissing unfair dismissal claim – misconception of legal principles, not affecting arbitrator's reasoning in practice

– Despite flaws ultimate findings ones that a reasonable arbitrator might have come to, except in respect of procedural fairness of one employee's dismissal- Award partially set aside and relief awarded)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an opposed review application brought by the individual applicants Mr M Thenjwayo and Mr W Remmego to review an arbitration award in which the arbitrator dismissed their unfair dismissal dispute.

[2] The matter was initially enrolled on 20 April 2023 but could not proceed because half the transcript was missing. By agreement, when the hearing reconvened, it was conducted virtually using Zoom. There were a number of preliminary condonation questions which had been raised in the course of the filing of pleadings concerning the late filing of the review application, the late filing of the answering and replying affidavits. At the commencement of the reconvened hearing, the parties' representatives agreed they no longer took issue with the non-compliance with time limits for filing documents. I am satisfied that in the circumstances, there was no undue prejudice suffered by any party and any court process not filed timeously should be condoned.

Background

[3] The applicants, Mr M Thenjwayo ('Thenjwayo') and Mr W Remmego ('Remmego') were dismissed by the first respondent ('the city' or 'the municipality') following an incident during a grievance hearing in which they were the grievant parties, who had complained about their superior, Mr T Thofile ('Thofile').

[4] The incident formed the basis of the three primary charges against both the applicants, comprising assault and intimidation (charge 1), insolence and insubordination (charge 2) and contravening Clause 2 (b) and (d) of Schedule 2 of the Municipal Local Government: Municipal Systems Act 32 of 2000) ("the MSA") by failing to act in the best interests of the city and in

such a manner that guards against the compromise of the credibility and integrity of the city (charge 3).

[5] Additional misconduct Thenjwayo was accused of was:

5.1 insubordination for failing to obey an instruction in August 2016 to return to his previous post in Region D of the municipality (charge 2:count 2);

5.2 being absent from work without a medical certificate and/or absent without authorised leave on

5.2.1 27,28 October 2016;

5.2.2 17,18 November 2016;

5.2.3 23 January 2017 to 14 February 2017;

5.2.4 29 January 2018 to 14 February (charge 3);

5.3 fraudulently submitting a leave application and applying for sick leave stating that the medical certificate covered the period of 14 November 2016 to 18 November 2016, whereas it only covered the first three days but not 18 November 2016 resulting in Thenjwayo being paid an additional day's sick leave he was not entitled to (charge 4), and

5.4 in committing the conduct above, he failed to act in the best interests of the city and in such a manner that guards against the compromise of the credibility and integrity of the city (charge 5).

The arbitration award

[6] in her award, the arbitrator stated that the focus of the award would be on the disciplinary hearing and whether the proceedings were run in a "procedurally and substantively fair manner". She stated:

> "The occurrence at the grievance hearing and at subsequent interactions between the parties will be noted, however, the main focus will be to prove the applicants had discharge the onus to prove unfair procedure and substance in the manner the hearing was conducted."

In the analysis which followed, the arbitrator dwelt on whether Remmego could have obtained an alternative representative on 27 June 2018 by the afternoon when his enquiry resumed. On that occasion, the enquiry had been due to resume that morning, but Thenjwayo had left work to attend to a family related emergency and the shop steward, who had been present on 25 June was reported to be ill. The arbitrator seemed to be of the view that it was unrealistic to assume that Remmego could have obtained alternative representation by the afternoon, even if he was an experienced shop steward.

[7] The arbitrator concluded that apart from that instance there was "no unfairness on procedure or substance" that could be attributed to the "manner" in which the city dealt with the disciplinary proceedings. Despite her apparent misgivings about the procedural fairness of Remmego's dismissal, mentioned above, she nevertheless proceeded to find that Remmego could have been expected to attempt to defend himself and request an adjournment to a different date and there was no explanation why he did not make such an attempt. She further found that, as far as Thenjwayo was concerned, the municipality had stood his enquiry down for two days (until 29 June 2018) to enable him to present his defence and cross-examine any of the employer witnesses who testified on 27 June. Consequently, she found that he was given an opportunity to present evidence and defend himself against the charges.

[8] Having focused exclusively on the consideration of procedural matters, the arbitrator concluded:

> "The Applicants dispute for unfair dismissal is hereby dismissed."

Grounds of review

[9] The applicants' grounds of review, stated summarily, are that the arbitrator:

9.1 failed to make distinct findings on substantive and procedural fairness;

9.2 misdirected her analysis in assigning the applicants the responsibility of proving their dismissal was substantively and procedurally unfair;

9.3 failed to appreciate that the arbitration hearing was a *de novo* proceeding;

9.4 failed to appreciate that Remmego could not have found another representative on 27 June 2018 and should have asked for an adjournment;

9.5 materially erred in finding Thenjwayo did have an opportunity to present evidence on 29 June 2018 when he was on sick leave;

9.6 committed an irregularity in ending the arbitration without giving Remmego a chance to testify;

9.7 ignored alleged conflicts in the statements Thofile and Ramroop, which they made to the police in laying charges against the applicants;

9.8 failed to appreciate that there was allegedly no evidence of the applicants assaulting Thofile or shouting in the presence of other employees;

9.9 ignored the failure of the city to call the Labour Relations officer, who had also been present during the grievance hearing, to testify;

9.10 ignored that Mr Tofile allegedly called the applicants illiterate during the grievance hearing;

9.11 failed to take account of the fact that there was no investigation done prior to the institution of the disciplinary proceedings, and

9.12 ignored Thenjwayo's evidence relating to the charges concerning unauthorised sick leave and fraud.

Evaluation

Legal Principles

[10] The main principles governing the review were established in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[1], and elaborated on in decisions of the Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[2]. In *Herholdt* the SCA held:

> "[12] … the [Constitutional] court enunciated an unreasonableness test that differed from the test adopted by this court, namely, whether the award was one that a reasonable decision maker could not reach. That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance

[1] 2008 (2) SA 24 (CC)
[2] (2013) 34 *ILJ* 2795 (SCA)

than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence."

and further stated:

"[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 s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(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 on 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, are 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."

(emphasis added and footnotes omitted)

[11] The following dictum in *Head of Department of Education v Mofokeng & Others*[3] also has a bearing on the application:

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or

[3] (2015) 36 *ILJ* 2802 (LAC)

error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

(emphasis added and footnotes omitted)

[12] Lastly, the LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 943 (LAC) stated:

" [14] Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act 4 (LRA) continue to be determined in terms of s 145 of the LRA but that the constitutional standard of reasonableness is

'suffused' in the application of s 145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material."

(emphasis added)

[13] It is readily apparent from the award that the arbitrator's summary of the evidence and her analysis focused exclusively on procedural matters and she appears to have collapsed the determination of substantive fairness with the former. Nonetheless, her conclusion is not limited to a finding of procedural fairness and implicitly amounts to a finding that the dismissals were substantively and procedurally unfair. Her failure to make distinct findings in this respect amounted to a fundamental irregularity and insofar as the outcome entails a finding of substantive fairness, it was unsupported by anything in her award. On the face of it, her finding being devoid of any reasoning on the question of substantive fairness, the award is reviewable.

[14] It is also true that she made an incorrect statement of law in attributing an onus to the applicants to prove their dismissals were unfair, and that comments made by her at the commencement of arbitration proceedings suggested that she was unsure whether the arbitration proceedings were *de novo*. Despite these serious errors, there was little evidence to show that she did not conduct the arbitration hearing as a *de novo* one. Neither

does it appear that her analysis of procedural fairness actually was conducted on the basis of burdening the applicants with the onus.

[15] The difficulty facing the court is highlighted in the dicta cited above in *Herholdt* and *Kloof Gold Mine,* in which it was held that even where the arbitrator's reasoning cannot justify the outcome, a court must still consider whether the result is one a reasonable arbitrator could have reached. The court must determine this without any reliance on the arbitrator's reasoning.

[16] It can happen that the flaws in an award might be so fundamental that the court would be usurping the arbitrator's function if it dealt with the merits of the case in a case where the arbitrator had failed to perform a basic requirement of their duty to decide both the substantive and procedural of a dismissal where both issues require determination[4]. However, in this instance, it was only one leg of the fairness test that the arbitrator neglected to perform. At the review application hearing, both parties' representatives agreed that the evidence before the arbitrator was sufficient for her to determine the issues she ought to have considered. Given also the elapse of time since the first arbitration, it would not be appropriate to remit it to another arbitrator for reconsideration, even if it was done on the existing record.

[17] It must be emphasised though that this does not entail the court having to make its own determination on the evidence if a dismissal was substantively or procedurally fair, but merely to decide if the evidence before the arbitrator was such that no reasonable arbitrator could have concluded that the applicants' dismissals were procedurally and substantively unfair.

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[4] See in this regard *Department of Public Works v B S Mathews and Others* (JR 156/2021) dated 12 October 2023 in which the court remitted the arbitration back to the bargaining council for a fresh arbitration on the original record in circumstances where the original arbitrator had failed to make a finding on whether or not a dismissal had occurred and on the fairness of the dismissal if it did occur.

[18] In this regard, I note that the contention with that Remmego was not given an opportunity to testify at the arbitration hearing was not pursued. In my view this point was correctly abandoned, as there was nothing in the evidence to support a claim that the arbitrator had prevented him from testifying.

Could no reasonable arbitrator have found that the dismissal of each of the applicants was substantively fair?

[19] The main charges against both applicants stemmed from what transpired at the grievance hearing chaired by Dr Ramroop, Group Head: SHELA and FCM ('Ramroop'). The hearing began with them challenging Thenjwayo's reason for the postponement of the first hearing, which arose because he was allegedly writing an exam. They wanted the chairman to first deal with that before proceeding with the grievance hearing, but Ramroop was concerned to focus on the subject matter of the grievances they had lodged against Thenjwayo.

[20] Thenjwayo was the only witness for the applicants. His version of what transpired at the grievance hearing was that it was Remmego who queried the reason for the previous postponement of the grievance hearing and insisted that it be dealt with when Ramroop said that was not an issue to be dealt with at the hearing. Much of his evidence in chief about the grievance hearing did not concern the misconduct charges arising from it, but whether their grievance was properly addressed. He testified that in his view it was significant that Doctor raised the complaints about their behaviour before concluding the grievance process. He believed this was evidence of connivance between the chairperson and management to concoct charges against them.

For the sake of completeness, I note that all the grievances concerned Thofile alleged abuse of his authority in relation to granting paid leave, interference, undermining the authority of the grievants, nepotism, violation of leave policies, unilateral restructuring of the housing unit and sowing division in the unit. In his written report on the grievance handed

down at the end of July 2017 the chairperson dismissed most of the complaints on the basis that they had not been substantiated by the grievants. In relation to the complaint that Thofile was sowing division in the department he noted that, apart from the absence of tangible evidence of this, that "on the contrary there seem to be serious personal "issues" between the aggrieved and Thofile". He noted that the main object of the grievance procedure was to resolve work-related issues and not to address complaints of misconduct. If the grievants had sufficient evidence of misconduct committed by Thofile they should follow the correct procedures. The chairperson also referred to his memorandum of 4 July 2017 in which he had raised complaints of misconduct by the grievants in the course of the grievance hearing.

[21] Doctor's memorandum had been submitted to the housing director, Mr ES, the day after the grievance hearing. He described his duty as a chairperson of the hearing as an "unpleasant task" he had to perform as leadership in the city. He wrote the memorandum not in his capacity as chairperson of the enquiry, but as a group head. He stated, amongst other things, that:

> "As a senior leader in the City I cannot ignore what happened at the hearing yesterday.
>
> The two employees from the Housing Department, namely Thenjwayo and Remmego which is not in keeping with the conduct of municipal officials. The behaviour of the above-mentioned employees does not assist the City in achieving the Executive Mayors plan of creating a professional public service.
>
> As a senior leader in the City it is my recommendation that the two officials be immediately suspended from work pending a disciplinary case being formulated against them.

The correct procedure must be followed in suspending the shop steward which the Labour Relations Department can advise on.

The two employee's misconduct in my present are as follows:

1. Gross insubordination towards Thofile.

2. Threatening to assault Thofile.

3. Conducted themselves in a disgraceful manner in the presence of other city officials.

4. Acts of intimidation against Thofile.

5. Gross must behaviour showing a total disregard for Councils effective management.

It is further recommended the active threatening to assault Thofile be reported to the SAPS without any delay..."
(*sic*).

[22] Ramroop said, in his career, he had never sat in any forum which turned into such disarray. Prior to the hearing he had never met the applicants. He was shocked how they disrespected Thofile in the hearing, even telling him to 'shut up' at certain points. He confirmed that when the meeting adjourned they had threatened they would get Thofile, they were not scared of him and knew where he lived. He could not recall them using the English word 'kill'. They also showed disregard for the process he was conducting as a senior official of the city.

[23] In support of a case of assault being opened against the applicants, Thofile deposed to an affidavit on 13 July 2017, in which he briefly recounted the following:

> "On Monday 2017-07-03 at around 14 H 32 of my subordinates MT and W are confronted me and verbally abuse in me and physically approached me. They attempted assaulting me so I was covered and protected by Doctor's. After that they said they know where I live, they will deal with me. Meaning that they threatened my life they will find me and kill me.
>
> After that Doctor protected and escorted me from them outside of the building from there I only see them at work and do not talk to them. So Doctor advised me to come and…".

[24] A couple of weeks later, on 24 August 2017, Doctor deposed to a brief affidavit at a police station. The substantive portion of the statement read:

> "On Monday 2017-07-03 at 14H30 I was in grievance hearing at Civic Centre A block sixth floor, and during the grievance hearing there were threats against Thabo Thofile and I heard Walter [Remmego] saying he know where Thabo is staying, and then after the meeting it was when they pointed each other with finger and the meeting was over and they keep on shouting at him telling him that they know his family, and they are going to deal with him, and that all that I can remember and I left."
> (*sic)*

[25] Ramroop was challenged under cross examination why he deposed to this affidavit such a while after the incident, if it was so serious. His explanation was that he did not report the incident, but when he was approached for his statement by the police he deposed to it. The statement was drafted by the police official who interviewed him, and he signed it. He agreed that Thofile's statement did not mention the applicants' pointing fingers at him, unlike Ramroop's own statement to the police. It should be self-evident that the brief statements made to the police for the purpose of instituting criminal proceedings were not comprehensive. On its own, the failure of a witness to mention in such a statement everything another witness

describes in theirs, is not necessarily an indication of unreliability. Moreover, the fact that two statements describing the same event are not identical, tends to undermine an argument of collusion between witnesses, which was a contention advanced by the applicants.

[26] Thenjwayo claimed that the case was repeatedly postponed until they were informed that Thofile had decided to withdraw the charges against them, which he claims he protested against. He denied ever threatening or assaulting Thofile and denied that this or any of the other utterances alleged by Doctor and Thofile were evident from the transcript of the grievance hearing, some of which was read into the record of the arbitration proceeding. When the allegations set out in Doctor's memorandum and the affidavits were put to Thenjwayo, his response was that the affidavits conflicted and that the allegations were all false.

[27] When he was referred to an extract of the transcript of the grievance hearing in which Thofile is recorded telling Thenjwayo not to point his finger at him, and Thenjwayo responds that he is not talking to Thofile, Thenjwayo's response was that the extract was not a true reflection of what happened and denied ever pointing his finger at Thofile. When referred to another rapid exchange in the transcript mainly between Remmego and Thenjwayo, in which Remmego refers to Thofile as 'the accused' and Thofile accuses Remmego of being 'very personal', Thenjwayo denied that tempers were heated, describing it as merely an exchange of words, and that they were very calm. At another juncture, towards the end of the hearing, the chairman thanked everyone for being calm even though they got out of hand at times. Thenjwayo denied that matters got out of hand at any stage. In short, Thenjwayo's account of what transpired on the day of the grievance hearing was that it was calm, no threats were made, and everyone was civil. By contrast, with reference to numerous portions of the transcript of the hearing, Ramroop testified that there were times when he and the Labour Relations officer at the hearing had to repeatedly appeal to them to calm down.

[28] Thofile testified that the incident which he described in the affidavit arose as the grievance hearing was being concluded. They were shouting and Ramroop was forced to close the meeting. He elaborated how Ramroop 'covered' him, by interposing himself between the applicants and himself, when the meeting adjourned. Ramroop confirmed he had separated the applicants from Thofile so he could leave. Things escalated when the meeting was closed, which Ramroop corroborated. He also testified with reference to the transcript that he had tried to bring the meeting to an end, but the applicants insisted on raising issues, which prompted him to ask if he could be excused while they went on "fighting". Under cross-examination he confirmed this reference was to the two applicants' conduct towards Thofile. They were attacking him. The applicants were shouting and other staff on the floor stopped what they were doing because of the noise. If Ramroop had not been there, he believes he would have been physically assaulted. He never expected things would reach the stage of being threatened by colleagues. He claimed they said they would kill him. Because he was so affected by the incident and on the advice of Ramroop, he opened a case the following day, but police only came to interview him on 13 July. In the scuffle which occurred, Thofile could not say whether it was Thenjwayo or Remmego who had said they knew where he stayed, but one of them did and they were both aggressive. He would not have opened a criminal case otherwise. Ramroop testified that he advised Thofile to open a case in the event something happened to him, so he already had a record of the threat. He testified that Thofile had been reserved during the hearing and had behaved correctly.

[29] On the question of the withdrawal of the criminal case, he said it was only provisionally withdrawn in terms of an agreement at court using alternative dispute resolution, in terms of which the applicants had to agree not make any contact with him and not to intimidate him, failing which the proceedings could be reinstated. He claimed he had no wish to subject the applicants to criminal proceedings when they had already been dismissed. Ramroop gave a similar account. The city's representative at the

arbitration offered to produce a copy of the ADR agreement. This was not put to Thenjwayo when he claimed the charges were simply withdrawn.

[30] Under cross-examination of Thofile, it was suggested to him that where the chairperson had referred to people being irresponsible in the hearing, as recorded in the transcript, he was also referring to Thofile, even though it was Thenjwayo's version that nothing untoward happened at all.

[31] The evidence before the arbitrator, consisted partly of excerpts from the transcript which indicated a fractious hearing, in which he and the labour relations officer had to repeatedly call for calm. Added to that was the testimony of the three witnesses. It is difficult to see how an arbitrator could reasonably have concluded that the grievancce hearing was characterised by calm debate as Thenjwayo wished to portray it. The excerpts from the transcript were more consistent with a fraught hearing characterised by aggression on the part of the applicants. Thenjwayo's evidence lacks credibility when measured against the transcript. An arbitrator would also have to consider why a chairperson with no connection to the applicants or their department was moved to write such a forceful memorandum the day after the hearing. Other than a suspicion of a conspiracy on Thenjwayo's part, there was no evidence advanced that he was acting in cahoots with management in the applicants' department. While the applicants contend there was something contentious about the city not calling the labour relations officer as another witness, Remmego did not even testify to corroborate Thenjwayo's bald denial of wrongdoing, which was lacking in any detail.

[32] On the basis of the above, I am satisfied that there was more than a sufficient basis for the arbitrator to have concluded that the applicants were guilty of the most serious charges levelled against them concerning their conduct on the day of the grievance hearing. In the absence of even an acknowledgment that their conduct on the day was in any way unacceptable, quite apart from the absence of any contrition on their part,

it was well within the bounds of a reasonable arbitrator's determination to find that dismissal was an appropriate sanction.

[33] In view of this conclusion, as regards the remaining charges against Thenjwayo concerning unauthorised leave and his refusal to obey the instruction to relocate when his transfer was revoked, I will only deal with those briefly. Thenjwayo had launched a grievance against the revocation of his transfer, but that did not give him a right to ignore the repeated instruction to relocate to Region D until such time as his grievance was heard. It was serious intransigence on his part, even if I agree with the submission that this charge seems to have been raised belatedly and it is questionable why the employer did nothing about his insubordination at the time. In respect of the unauthorised annual leave which he took without obtaining confirmation that it was authorised, it is worth noting that earlier in his own testimony, he made it clear that until leave was authorised it could not be assumed it was in order, so his defence that he assumed it had been granted would be hard to accept. In relation to taking an extra day's leave not covered by a medical certificate, the balance of probabilities might have resulted in his acquittal of that charge, it would not have been untenable for an arbitrator to have concluded that he knew he was not entitled to it.

Could no reasonable arbitrator have found the dismissals were procedurally fair?

[34] The events on which the claim of procedural unfairness was based, concern the week of 25 to 29 June 2018. The disciplinary hearing for both applicants had been set down for those four days after a number of previous postponements. On 25 June, the applicants asked for an adjournment because they had referred an interpretation and application dispute to the bargaining council about the city using attorneys to represent it in the enquiry. The referral of the dispute had been made a month before the enquiry resumed on 25 June. When the chairperson refused to delay the hearing until the outcome of the bargaining council dispute, they took advice from the union and then asked for an

adjournment to give them time to launch an urgent application in the labour court to stay the hearing pending the outcome of the interpretation dispute. An adjournment was granted by the chairperson until 27 June.

[35] As mentioned, when the enquiry resumed on 27 June no urgent application had been launched and neither the shop steward nor Thenjwayo attended. However, Remmego did. He requested a further postponement for himself and for Thenjwayo. The chairperson agreed that Thenjwayo could come and defend himself on the last day of the enquiry. Remmego, who was requesting a postponement for Thenjwayo, was advised of this and an email was sent to the shop steward and Thenjwayo advising of the postponement and that he should obtain alternative representation if necessary. Thenjwayo claims he did not get the email because he was on sick leave at the time so he was not at work and did not see his emails until he came back to work the following week. He did not explain why he had not followed up with Remmego or his shop steward about what had happened on 27 June, even though he was expecting Remmego to obtain a postponement of the enquiry. That seems inherently implausible and in any event the hearing was scheduled for four days, so there was no reason for him just to assume nothing would happen because he had not been able to attend on one day. It was not argued that their shop steward was off for the whole week. If he was ill for the week, there was no evidence the chairperson was advised of that. In the circumstances, it is difficult to see how it could be said the employer did not give Thenjwayo a reasonable opportunity to defend himself against the charges, particularly given the number of times the enquiry had been convened before then. There was certainly an adequate basis for an arbitrator to find that his dismissal was procedurally fair.

[36] Remmego's situation was somewhat different. On 27 June, after successfully obtaining a postponement for Thenjwayo, he was advised his enquiry would proceed but it was adjourned until around 14h30 to give him a chance to get another representative to replace the shop steward who was ill. He was unsuccessful, but remained in attendance at the hearing

and heard the evidence of the employer's witnesses. He declined the opportunity to cross examine them or lead his own evidence, when it was offered to him.

[37] The question is whether the arbitrator could reasonably have held that the employer gave Remmego sufficient opportunity to find an alternative representative. The arbitrator's own equivocation in the award on this question demonstrated she was in two minds about whether it was unfair to insist on proceeding in the afternoon of 27 June, when Remmego was unable to obtain an alternative representative. As the employer had agreed to postpone Thenjwayo's enquiry, it is difficult to understand why it could not have granted Remmego until the next day, at the very least, to find a representative.

[38] The importance of a right to representation has long been recognised as a component of fair enquiry[5]. Ultimately, the question is whether a procedural flaw vitiates the fairness of the process. The employer argues that Remmego was a shop steward himself, so would have had no difficulty representing himself. That might be so, but shop stewards do not have less right to be represented than any other employee. It seems that the arbitrator failed to appreciate that the time afforded to Remmego to find a representative on 27 June was simply insufficient and effectively made it most likely he would not be able to obtain a substitute. In the circumstances, an important pillar of procedural fairness was removed and the arbitrator should have realised that.

[39] Consequently, I am satisfied that the arbitrator would have found Remmego's dismissal was procedurally unfair on account of being deprived of a reasonable opportunity to find a substitute representative. While an award of compensation does not automatically follow from such a finding, some solatium should have been awarded to Remmego. Accordingly, it is necessary to substitute the finding and grant some relief

[5] See e.g *Molope v Commissioner Mbha & others* (2005) 26 ILJ 283 (LC) at 291H-292H and the cases cited therein. See also *Coin Security Group (Pty) Ltd v TGWU & others* [1997] 10 BLLR 1261 (LAC) at 1272-3.

for a procedurally unfair dismissal in Remmego's case. In doing so, I am nonetheless mindful of the fact that by 27 June, the employer had to postpone the enquiry a number of times at the instance of the applicants and the adjournment from 25 to 27 June was occasioned by the applicants' disingenuous tactic of raising the CCMA referral as a reason for a further delay only on 25 June, when they made the referral a month earlier. To some extent the employer's understandable frustration in being unable to proceed with the enquiry mitigates its failure to postpone the inquiry at least to 28 June.

Conclusion & Costs

[40] In light of the discussion above, I am satisfied that the arbitrator's implicit decision that the dismissal of the applicants was substantively fair, is one that a reasonable arbitrator might have reached. The same can be said of her implicit finding on procedural fairness in relation to Thenjwayo, but not in respect of Remmego.

[41] As there were some notable conceptual flaws in the arbitrator's award and a failure to analyse the substantive fairness of the dismissals, I accept that the applicants had reason to believe the decision might be reviewable. In the circumstances, despite the limited success of the application, it would not be appropriate to make a costs order.

Order

[1] The late filings of the review application, the answering affidavit and the replying affidavit are condoned.

[2] The finding of the Third Respondent in her arbitration award dated 26 June 2019 under case number JMD 071822 to the effect that the Applicants' dismissal dispute should be dismissed, is reviewed and set aside insofar the procedural fairness of the Second Applicant's dismissal is concerned.

[3] Accordingly, paragraph 20 of the said award is substituted with the following:

> "20. The Applicants' dismissal was substantively fair and the First Applicant's dismissal was also procedurally fair, but the Second Applicant's dismissal was procedurally unfair.
>
> 21. The Respondent must pay the Second Applicant one month's remuneration calculated at the date of his dismissal as compensation."

[4] The First Respondent must comply with the relief awarded in paragraph [2] of this order, within fifteen days of the date of this judgment.

[5] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	G Phakedi of Phakedi Attorneys Inc.
For the First Respondent	I Kapalu of Moodie & Robertson