THE REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D495/12 & D655/12

In the matter between:

ETHEKWINI MUNICIPALITY **APPLICANT**

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION **FIRST RESPONDENT**

V S NHLAPO **SECOND RESPONDENT**

MOODLEY N.O. **THIRD RESPONDENT**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **FOURTH RESPONDENT**

Heard: **17 December 2013**

Delivered: **22 April 2014**

Summary: practice and procedure – arbitration award – review of – serious misconduct - commissioner's findings unsupported by evidence – based on speculation – award set aside.

JUDGMENT

HARKOO, AJ

Introduction

[1] This is an application to review and set aside the arbitration award issued by the third respondent ("the commissioner") under case number EMD 101139. The application is opposed by the first and second respondents.

[2] The first and second respondents launched an application for the condonation of the late filing of the opposing affidavit which was opposed by the applicant.

[3] The first and second respondents also launched an application, in this court in terms of section 158 of the Labour Relations Act[1] under case number D655/12 to have the arbitration award handed down by the third respondent made an order of court; the notice of motion incorrectly refers to a settlement agreement. This application is opposed by the applicant (the respondent under case number D655/12).

[4] Both matters, that is, the present review under case number D495/2012 and the application under case number D655/2012 have been consolidated.

[5] At the outset of these proceedings, both counsel for the applicant and the counsel for the first and second respondents have agreed that this Court shall

adjudicate the merits of the review application, taking into consideration all the papers filed here in, including the opposing affidavit, and make a ruling that will be applicable to both matters. I shall therefore deal primarily with the review application.

Background

[6] The second respondent was employed by the applicant as a principal clerk and at the time of the dismissal he was acting in a higher post as a senior administration officer at the housing unit. He earned R12,000.00 per month. As at July 2011, he had been in the applicant's employed for close on twenty years.

[7] The second respondent was initially charged with unlawful use of the applicant's motor vehicle for his own personal use. A disciplinary hearing was held on the 6 December 2010 relating to that charge; he was dismissed on that day. An appeal was held on 14 February 2011 and he was reinstated.

[8] However, after his dismissal on the 6 December 2010, the second respondent was instructed by the applicant to return the applicant's motor vehicle to his place of work at the Jacob's depot.

[9] The second respondent instead drove the vehicle to his home and thereafter to the Embo Forest where he damaged it by shooting seven bullet holes into the body of the vehicle. The applicant then brought charges against the second respondent, which are read as follows:

> 'In terms of the Rules and Procedures governing the eThekwini Municipality of the South African Local Governing Bargaining Council, it is alleged that you contravened:
>
> > Clause 1.2.10 of the Disciplinary Procedure which read refrain from wilful or negligent behaviour, which may result in damage of property,

[1] Act 66 of 1995

in that on the 6th December 2011 (2010) at approximately 12h35 up until 16h42, the Council vehicle NDM 9117 that was allocated and in your possession as per your acting capacity on the said date was found severely damaged'.

[10] A disciplinary hearing was convened on 18 July 2011, it continued on 21 July 2011 and was concluded on 28 July 2011. At the disciplinary hearing, the second respondent pleaded guilty to the charges.

[11] At the disciplinary hearing, the presiding officer heard arguments in mitigation and aggravation on behalf of the second respondent and the applicant respectively. He concluded that the authenticity of the medical notes submitted by the second respondent were in serious doubt. He was of the view that the medical note which was erroneously dated 6 December 2011, instead of 6 December 2010, was issued in retrospect to coincide with the date of the incident. He found that at the time of the appeal, which was two months after the initial dismissal on the 6 December 2010, the second respondent made no mention of any medical condition. He also concluded that the applicant would not put trust in an employee who wilfully uses his firearm to shoot at an official vehicle and cause damage thereto. He consequently imposed a sanction of dismissal.

[12] The second respondent referred an unfair dismissal dispute to the fourth respondent for conciliation and arbitration. The third respondent, being the commissioner, found the dismissal of the second respondent to be substantially and procedurally unfair, directed the applicant to reinstate the second respondent and directed the applicant to pay him the sum of R108,000.00 being the arrear salary. It is this award that the applicant seeks to review.

<u>The arbitration hearing</u>

[13] The arbitration hearing was held on 23 January 2012 and 4 April 2012. The second respondent was represented by a union official Mr Nyandeni and the applicant was represented by Mr Nyawose from its management.

[14] At the arbitration hearing, the applicant presented the evidence of Mr Mark Winston Hill, a director of Digico which supplies the C-Track System, a tracker, to the applicant's motor vehicles. He confirmed the movements of the vehicle during the relevant period when it was in the second respondent's possession.

[15] The applicant also presented the evidence of Mr Xolani Innocent Mbali ('Mbali'), who testified that he was able to locate the vehicle using the tracker system. He testified further that when he arrived at the Embo Forest, together with Mr Ntuli ('Ntuli'), a team leader, and the second respondent's wife, he found the applicant's motor vehicle with seven bullet holes in the body of the vehicle. He found the second respondent close to the vehicle. The second respondent was consuming intoxicating liquor. He also found the second respondent in possession of a firearm allegedly used to damage the applicant's motor vehicle. He retrieved the firearm from the second respondent and drove the applicant's motor vehicle with the second respondent inside; while Ntuli drove his vehicle with the second respondent wife inside. He went to the Jacob depot where he left the applicant's motor-vehicle and then took the second respondent home in his own motor vehicle.

[16] The second respondent testified on his behalf at the arbitration hearing. He admitted that he had taken the applicant's motor vehicle to the Embo Forest, that he had fired shots into the motor-vehicle and that Mbali retrieved the vehicle from him. He stated that he was shocked at the sanction of dismissal on the 6 December 2010. He was crying and could not believe what was happening to him. He explained that he went home and wrote a suicide letter where he said goodbye to his children who did not know what had happened. He stated that he drove around looking for a quiet place as he had tried to kill himself at home but could not do so because the pictures of his children were in his room. He does not drink but thought that if he was drunk then maybe he

would be able to kill himself and that was the reason why he drank. He tried to commit suicide but only thought about what was going to happen to his children. He was shocked and was “not right in my (his) mind”. He felt betrayed because the management of the applicant assured him that the initial hearing on the 6 December 2010 was merely a procedure to enquire what he had done when he unlawfully used the motor-vehicle for his personal use. He admitted that he damaged the motor vehicle and took responsibility for it. He regretted doing it. He consulted a doctor on 7 December 2010 and he received counselling. He also submitted a medical note. He requested to be reinstated.

The arbitration award

[17] The third respondent, in reinstating the second respondent made in the following award:

> ‘30. The dismissal of the employee. Sthembiso Nhlapo is found to be substantially unfair and procedurally unfair.
>
> 31. The employer. Ethekwini Municipality Housing is directed to reinstate the applicant in its employment on terms and conditions no less favourable to him than those which applied on the date of his dismissal on 28 July 2011;
>
> 32. The respondent is directed to pay the applicant (the second respondent) arrear salary in the amount of R108,000.00 (one hundred and eight thousand) within 30 days of receipt of this award;
>
> 33. The applicant is directed to report to work within 5 days of receipt of this award’.

It is this award that the applicant seeks to review.

Grounds for review

[18] The essence of the review is that the award issued by the third respondent cannot be sustained on any factual, legal or equity based standard.

[19] The applicant contends that all the findings by the third respondent are irrational and unsupported by evidence and therefore seeks to have the award set aside and remitted to the fourth respondent for determination *de novo* by another arbitrator other than the third respondent.

The test for review

[20] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] Navsa AJ, held that:

> 'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct,… the effect of the dismissal on the employee and his or her long-service record. This is not an exhaustive list.'[3]

> 'To sum up. In terms of the LRA, a Commissioner has to determine whether a dismissal is fair or not. A Commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. It in arriving at a decision, a Commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'[4]

[2] (2007) 28 ILJ 2405 (CC) also reported at (2007) 12 BLLR 1097 (CC).
[3] At par 78.
[4] At par79.

The Constitutional Court held further that in the light of the constitutional requirement (section 33 (1) of the Constitution[5]) that everyone who has the right to administrative action that is lawful, reasonable and procedurally fair, 'the reasonableness standard should now suffuse section 145 of the LRA[6]'. The Court set the threshold test for reasonableness of an award or ruling as follows: 'Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'[7]

[21] The Labour Appeal Court in *Gaga v Anglo Platinum Ltd and Others*[8] stated the following:

> 'Where a Commissioner fails properly to apply his mind to material facts and unduly narrows the enquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determine the case before him. The ensuing decision inevitably will be tainted by dialectical unreasonableness (process related unreasonableness), characteristically resulting in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness). There will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of a decision. If a Commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable. The flaw in the process alone will usually be sufficient to set aside the award on the grounds of its been a latent gross regularity, permitting a review in terms of s 145(1) read with s 145(2)(a)(ii) of the LRA.'[9]

[22] In essence therefore, a commissioner is obliged to properly apply his or her mind to all the relevant and material facts and arrive at a decision that can be reasonably justified, having regard to the evidence placed before him or

[5] Act 106 of 1996
[6] Act 66 of 1995.
[7] At par 110.
[8] (2012) 33 ILJ 329 (LAC) at par 44

her. Where a commissioner makes a finding that is based on speculation, or is not supported by evidence that is sufficiently reasonable to justify the decision, or that cannot be sustained on any factual, legal or equity based standard, the commissioner arrives at a decision which no reasonable decision maker could reach.

Analysis of evidence and arguments raised.

[23] The respondent, correctly noted in her award that: 'Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious, and…' She found that: 'even though the applicant did damage the property of the employer he was not in the correct frame of mind to have acted rationally and therefore his actions were not wilful and negligent'. She premised her award on the fact that the second respondent had 19 years of service with a clean disciplinary record who has been dismissed, to suffer shock and bewilderment and therefore did not have the necessary *mens rea*. She justified this finding by the fact that the second respondent was reinstated in February 2011 after the initial dismissal.

[24] The damage to the motor vehicle and the manner in which it was done (by shooting seven bullet holes into the body of the vehicle), is not only serious but the conduct, or rather the misconduct, of the second respondent was careless, reckless and dangerous. Such conduct cannot be acceptable in any civilized society. Substantial and compelling evidence would therefore be required to sustain a reasonable explanation.

[25] The third respondent, in one hand, found that the issue of the second respondent's treatment for depression or some other mental disease was

[9] At par 44

irrelevant and neither was it is relevant as to when exactly he was treated; on the other hand she held that the applicant had suffered shock or anxiety after receiving the news of the initial dismissal and therefore he was not in his correct frame of mind to have acted rationally; his actions therefore were not wilful and negligent. She relied also on the evidence of the applicant's witness. Mbali, stated that he, the second respondent, was drunk and not in his correct state of mind.

[26] The opinion of a lay witness is of little relevance and would be inadmissible if it is evidence of opinion only. In *R v Ndhlovu*, the court stated:

> 'The dividing line between what is evidence of opinion and what is evidence of fact must often be difficult to demarcate with accuracy. Evidence which takes the form of a bare statement of fact must often, in truth, be an inference from other facts and therefore, to some extent, an opinion, e.g. evidence of a person's appearance or condition: 'He was upset' or 'he was angry' or 'he was well-dressed'. If the appearance or condition of the person concerned was the issue in the case, such evidence would clearly be inadmissible as being evidence of opinion only.'[10]

[27] I agree with the submissions by the applicant that where a litigant relies on the bare evidence that he was 'shocked' or 'upset' and that this effectively negated any *mens rea* either in the form of intent or negligence, he bears the onus to prove the allegations on a balance of probabilities. The failure to therefore lead expert opinion will be fatal to such a litigant.

> 'It is accepted that a witness may be entitled to tender the evidence of his general impression as to the state of another person. He may be entitled to point out those facts which support the impression but he cannot give expert evidence or opinion evidence as to the fitness or unfitness of that person to do or abstain from doing certain things.' See *R v Davies*[11]

[10] 1954 (4) NPD 482 at 484
[11] (1962) 3 All ER 97 at 98

[28] There was no evidence to support the contention that the second respondent was so intoxicated that he was not in his correct frame of mind to have acted rationally, or that he did not have control of his faculties or that he did not appreciate the wrongfulness of his conduct and therefore his actions were not wilful and negligent.

[29] The third respondent's finding that the second respondent 'was not in his correct frame of mind to have acted rationally and therefore his actions were not wilful and negligent' cannot be sustained and is left to pure speculation. It is a decision that no reasonable decision maker could reach.

[30] Turning to the issue of the procedural fairness. The third respondent found that as the decision to dismiss the applicant was made at the same time, it was seen as a hasty decision and therefore procedurally unfair.

[31] The record shows that the disciplinary hearing commenced on 18 July 2011 continued on the 21 July 2011 and was concluded on the 28 July 2011; the second respondent pleaded guilty to the charges. The third respondent's finding of 'a hasty decision' is certainly not borne out by the record and the inference that the chairperson did not apply his mind to the matter has no basis. The third respondent's finding that the disciplinary hearing was procedurally unfair is therefore irrational.

[32] For the reasons set out above, I am of the view that the third respondent's finding in regard to both the substantive and procedural issues are irrational, unsupported by any evidence and are simply speculative. The award therefore serves to be reviewed and set aside.

[33] This is not a case where the court could simply substitute its decision for that of the arbitrator. The dispute should be remitted to the fourth respondent in order to conduct a full and proper enquiry into the conduct of the second respondent before another Commissioner.

[34] As regards the issue of costs, the first and second respondents, having been armed with an award in their favour were entitled to bring the application in terms of section 158 under case number D655/12 and were entitled to oppose the review proceedings under the present case number D495/12. It would be just and equitable therefore, not to make an order for costs in both matters.

Order

[35] I therefore make the following order:

35.1. the arbitration award issued by the third respondent under the auspices of the fourth respondent dated 24 April 2012, under case number EMD 101139, is reviewed and set aside;

35.2. the section 158 application brought under case number D655/12 is dismissed;

35.3. the dispute is remitted to the fourth respondent for determining *de novo* before another arbitrator other than the third respondent;

35.4. there is no order as to costs in both matters, that is case number D495/12 and D655/12.

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Harkoo, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate V Naidu

Instructed by:	Hughes – Mandondo Inc
For Respondent:	Advocate S J Linscott.
Instructed by:	Tomlinson Mnguni James.