REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT LABOUR COURT

JR 2001/05

In the matter between:

RAND WATER Applicant

and

M. LEGODI N.O First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Third Respondent

THE DIRECTOR OF COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Fourth Respondent

SAMWU obo M. MADUNA Fifth Respondent

JUDGMENT

REVELAS J

[1] The applicant seeks to review an award in terms of which the

dismissal of Mr Moses Maduna ("Maduna") by the applicant, was held to be both procedurally and substantively unfair, and Maduna was reinstated.

[2] At the time of his dismissal on 20 April 2004, Maduna had been in the employ of the applicant as a gardener since 1993. His dismissal which followed charges of bribery, giving false testimony and dishonesty, was confirmed at an appeal hearing held on 20 August 2004. The unfair dismissal dispute subsequently referred to the South African Local Government Bargaining Council ("the SALGBC" or "the Council") by the fourth respondent ("the Union") was eventually arbitrated by the second respondent ("the arbitrator").

[3] The person who was the complainant in the matter which gave rise to the charges levelled against Maduna was, Ms Mathoto ("Mathoto"). She only gave evidence at the disciplinary hearing, but not at the arbitration hearing. The arbitration hearing was postponed on the first occasion it was to be to be heard, in order to obtain Mathoto's presence and testimony. Tracing agents employed by the applicant were unsuccessful in tracing her whereabouts, and the rescheduled arbitration hearing continued without her. The record of the disciplinary hearing was produced in evidence at the arbitration hearing by the applicant, who called one further witness, Mr Abel Matshatshe ("Matshatshe"), who also gave oral evidence at the disciplinary hearing.

[4] At the onset of the arbitration hearing, the union representative voiced his objection to the transcript of the disciplinary hearing proceedings being handed in as evidence in support of the applicant's case. He argued that an arbitration hearing is a hearing *de novo* and that the transcript of the disciplinary proceedings

would only be inadmissible hearsay. The arbitrator expressed her understanding of the applicant's problems in tracing Mathoto. The arbitrator conveyed to both parties that oral evidence would be preferable, but stated that she would listen to "whatever evidence you present and then I will weigh it accordingly".

[5] Maduna gave evidence on his own behalf. The arbitrator concluded in her award, that in the absence of Mathoto, who was the only person who could give direct evidence of events, she could not find against Maduna. She relied on the view that arbitrations are hearings *de novo* and found that the record of the disciplinary enquiry could not be accorded any weight since it was merely a document which amounted to hearsay evidence.

[6] The applicant, in support of its contention that the transcript be regarded as permissible, relied on section 3 of the Evidence Law Amendment Act, 45 of 1988 ("the Amendment Act"), which permits hearsay in certain circumstances. Its case was essentially that the arbitrator had a discretion to exercise in deciding whether or not to admit the hearsay evidence (transcript of the enquiry and ancillary exhibits), and she did not exercise her discretion appropriately (or at all) and that resulted in the applicant not having a fair trial.

[7] Section 3 of the Amendment Act reads as follows:

'(1) Subject to the provisions of any other law, hearsay evidence shall

not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
vi) any prejudice to a party which the admission of such evidence might entail; and
vii) any other factor which should in the opinion of the court be taken into account'

is of the opinion that such evidence should be admitted in the interest of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) *(b),* if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay

evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph *(a)* of subsection (1) or is admitted by the court in terms of paragraph *(c)* of that subsection.

(4) For the purpose of this section-
'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.'

[8] The above legislation clearly permits hearsay evidence in certain circumstances. Sections 34(1) and (2) of Part IV of the Civil Proceedings Act, no 25 of 1965, also permits hearsay in the form of a record in certain circumstances, which are not dissimilar to those enunciated in the Amendment Act. One has to evaluate the transcript of the disciplinary hearing and that record thereof to determine whether or not to interfere with the arbitrator's findings.

Evidence at the Disciplinary Hearing

[9] At the disciplinary hearing the main witness for the applicant was Mathoto. She testified that Maduna had ensured her of an employment position with the applicant, provided she paid him R500, 00 coupled with a sexual favour, which she complied with. According to her, she agreed to his terms (have sex with Maduma and pay him) was because she was "desperate for a job".

[10] She testified that during the second week of February 2004 she was

employed as a packer in a store which prides itself on selling items which cost R5, 00 or less. Her salary was R500, 00 per month. According to her, Maduna approached her in the shop with his promise of a position in return for a R1 000, 00. When she indicated that she could not afford R1000, 00, he reduced the amount to R500, 00 and added the condition of a sexual favour. On a Saturday at the end of that month he, came to the shop with an application form, whereafter they went to a restaurant. Thereafter they went to a motel where they had sex, which she described as "rough" and which caused her to distrust him. He was, according to her, in a hurry and not very helpful in completing the application form to be employed by the applicant.

[11] When Mathoto realized that Maduna had no intention to procure employment for her at the applicant, she went to the applicant's offices in Vereeniging with her brother. She also testified about discussions with other persons whom Maduna engaged in discussions with promises of procuring employment with the applicant. There, at the applicant's offices, they met with a supervisor from the applicant's protective services (Matshatshe). He confirmed Mathoto's testimony that she had made a report to him to wit, that Maduna had made a promise of employment for her with the applicant in return for sex, and payment of R500, 00. A discussion followed and Maduna agreed to refund Mathoto for the R500, 00. The agreement was reduced to writing and was an exhibit at the disciplinary hearing and formed part of the record at the arbitration hearing. It reads as follows:

> "**I, Moses Maduna agree to refund ELIZABETH Mathoto R500, 00 that will be paid on Tuesday 9 March 2004"**

The undertaking is dated 6 March 2004 and is signed by Maduna.

[12] It was common cause between Maduna and Matshatshe, that Mathoto's brother wanted Maduna to pay an extra R300, 00, in addition to the R500, 00. As I understood it, it was payment as some form of damages or solatium to compensate for the "illicit" sexual intercourse. At the arbitration hearing, Matshatshe testified that Mathoto had reported to him that Maduna actually wanted R1000, 00 to procure a position for her. When she told him she only earned R500, 00 per month, he reduced the payment to R500, 00 plus sex in the motel. This was also Mathoto's version at the disciplinary enquiry. According to her, Maduna gave her an application form for employment with the applicant at the motel.

[13] Maduna's version at both hearings was that he never asked Mathoto for money, or promised her employment with the applicant. His explanation for her production of the application form for employment completed by her, is that it is very easy for anyone to obtain an application form for employment with the applicant. The undertaking to pay her R500, 00, he said, was not a 'refund', but a payment for her medical bills of which he became aware of in his capacity as her lover. He alleged that as a result of their sexual relationship, she developed an excessive bleeding problem which resulted in medical expenses. According to

Maduna, he and Mathoto had sex on two occasions. Thereafter she became aggrieved by his neglect of her (not "attending to her anymore) and then she made false allegations against him. At the disciplinary hearing he claimed that he was still in love with her.

[15] I will now deal with the arbitrator's findings on procedural fairness.

Procedural Fairness

[16] The arbitrator found that Maduna's dismissal was not only substantively unfair. She held that it was procedurally unfair because he had no option, but to continue with the disciplinary enquiry without his representative being present. His representative was unavailable on the day. The transcript reflects that Maduna (a shopsteward) was asked if he was willing to continue without Mr Kganga (his representative from the union), and he agreed. The statement that Maduna was forced to continue without representation is factually incorrect. The arbitrator also held that the transcript of the disciplinary proceedings reflected that Maduna did not understand his rights and that they were "flagrantly" disregarded by the enquiry chairperson, who warned him not to speak to other witnesses, without them being called or him being under cross-examination.

[17] The transcript of the disciplinary enquiry reflects that Maduna was given a fair hearing, in that he was given ample opportunity to state

his case, cross-examine witnesses, and argue his case. To warn Maduna not to discuss the matter with other witnesses does not mean that Maduna's rights were trampled on, as the arbitrator had found. Employees who are suspended pending an investigation are often warned not to discuss the matter with potential witnesses. Very often, the mere fear of interference with witnesses, is an acceptable ground to suspend an employee. In my view, the arbitrator set an unreasonably high standard of procedural fairness for a disciplinary enquiry in this case. Her finding that the dismissal of Maduna was procedurally unfair is without proper foundation. Furthermore, the procedural points taken by Maduna at the arbitration hearing, such as the splitting of charges, suggest a certain experience in disciplinary matters.

Substantive Fairness and Hearsay Evidence

[18] In my view, the fact that arbitration proceedings are regarded as hearings *de novo* does not mean that the legislation permitting hearsay in certain circumstances, would not apply to arbitration hearings, which is the reasoning the arbitrator seemed to have followed. The decision-maker or trier of fact, faced with the same situation as the arbitrator was faced with in this case, had a discretion to permit hearsay evidence or to exclude it. To determine whether he exercised that discretion judiciously, or in a manner resulting in one party not having a fair trial, necessitates some scrutiny of that hearsay evidence. In this case, it was the evidence given at the disciplinary hearing in other words, the transcript.

[19] If the arbitrator had weighed the transcript of the disciplinary enquiry ("the transcript"), in conjunction with the oral evidence led before her, she may not have readily rejected the applicant's version of events. She should have questioned the likelihood, of a person (on a gardener's income) gratuitously promising to give anyone, even a girlfriend, R500, 00 and to the promise the payment and thereof describe it as an agreement to "refund" the said amount by a certain date. In my view, the agreement to "refund" Mathoto is an indication of some kind of moral pressure to rectify a wrong, occasioned the presence of the protection supervisor. The arbitrator should also have questioned Maduna's crude version, namely that he gave Mathoto (a married woman), the money for a bleeding problem which arose as a result of their sexual relationship which consists of two sexual encounters, on his version. She also held that Matshatshe in his testimony confirmed the aforesaid version. His testimony on this aspect was that Maduna had said that he was aware of "how she is suffering". It appears to be Mathoto's financial difficulties that was referred to, and not her medical problem.

[20] During cross-examination, Matshatshe reiterated that Maduna had said that he would "refund" Mathoto because she was suffering. He made it quite clear on page 71 of the record, that the payment was not to be made as a gift, but as a refund, for money that was taken, but not owed.

[21] On Maduna's version, he slept with Mathoto only twice, and then he neglected her for some time. This version, contradicted by his version that he still loved her, is inconsistent with the existence of her so-called medical problem for which he said he was partly responsible. Why a married woman would want to approach Maduna's employer for such a personal matter is inconceivable. She arrived with an application form for employment with the applicant and a complaint that she was induced to pay money and have sex to procure that employment, according to the supervisor.

[22] The arbitrator had to decide whether that hearsay evidence was permissible or not. In terms of section 3(1) of the Amendment Act, hearsay evidence may be permitted in certain circumstances such as when the relevant witness is not available and it would be in the interest of justice to do so. Once the decision is made to admit the evidence, then the weight to be given to the particular testimony depends on the probabilities and credibility of the witnesses. No arbitrator or judge should readily admit hearsay evidence when a witness has disappeared. All the facts have to be assessed, in addition to the purpose for which the evidence is to be led. The arbitrator did not make such an assessment.

[23] If all the facts and evidence, (including, and in particular, the transcript of the disciplinary hearing) are weighed up, there are indications that Maduna was involved in extortion of some kind. The arbitrator erred in law, by rejecting the transcript entirely as hearsay, and then selectively relying on it to make certain findings

in favour of Maduna. The arbitrator's error resulted in an unfair trial.

[24] An employer is entitled, to take disciplinary action in circumstances where there were reasonable grounds for a suspicion of gross misconduct. The same principle should certainly apply in a case where the main witness is missing and there are strong indications in the transcript of the disciplinary proceedings that gross misconduct probably did occurr. In as much as the arbitrator told the parties that she would "weigh" all the evidence (including the transcript), she accorded it no weight whatsoever. She said as much in her award. In doing so she erred in law. That error resulted in an unfair trial, insofar as the applicant is concerned.

[25] This award should be set aside. I am not prepared to exacerbate the problem by deciding the matter on the record before me. Another arbitrator must hear oral evidence (which I could not do) and consider the transcript of the disciplinary enquiry proceedings in conjunction therewith. Perhaps Mathoto may even be traced before that next arbitration hearing.

[26] In the event, it is ordered as follows:

1. The award of the first respondent (Ms M Legodi) is hereby set aside.

2. The dispute is remitted to the second respondent to be arbitrated by a different arbitrator.

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Elna Revelas
Judge of the Labour Court

Date of hearing: 03 May 2006

Date of Judgement: 09 May 2006

Oh behalf of the applicant:

Adv. F.S Boda

Instructed by: KNRP Attorneys

On behalf of the respondent:

Adv. T.M.G Euijen

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