Reportable
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IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO JR 1846/09

In the matter between:

MEC FOR EDUCATION, GAUTENG	**APPLICANT**
and	
DR N M M MGIJIMA	**1ST RESPONDENT**
PUBLIC SERVANTS ASSOCIATION	**2ND RESPONDENT**
M J TSABADI N.O	**3RD RESPONDENT**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**4TH RESPONDENT**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an award made by the third

respondent ('the arbitrator') on 24 May 2009, in a 'pre-dismissal' arbitration conducted under s 188A of the Labour Relations Act. The arbitrator found the first respondent ('Mgijima') not guilty of all of the charges brought against her.

Factual background

[2] The material facts are not in dispute. Mgijima was appointed as the deputy director general in the Gauteng Department of Education ('GDE') on 1 December 2008. Prior to that date, she had been employed by the national Department of Arts and Culture ('DAC'). Mgijima applied for the vacant position of deputy director general on 22 February 2007. She attended an interview with the GDE on 13 August 2007. Unknown to the GDE at the time, Mgijima had been suspended by the GDE on 3 July 2007, in relation to disciplinary charges that the DAC had stated that it would bring. Mgijima did not disclose that she was on suspension, and when she was specifically asked whether she had any 'skeletons in the closet', she replied in the negative. Soon after the interview, on 12 September 2007, the DAC gave Mgijima formal notice of the disciplinary charges against her. Mgijima was successful in her application for the GDE post, and signed a contract of employment on 5 November 2007, effective from 1 December 2007. Around this time, Mgijima entered into a settlement agreement with the DAC in terms of which she resigned from the DAC and the DAC, in turn, withdrew all charges against her.

[3] The GDE came to learn of the circumstances of the termination of Mgijima's employment with the DAC some months after she commenced working at the GDE. The GDE considered her lack of disclosure of her suspension and pending disciplinary charges to be of a serious nature, and claimed that had it been aware of the true facts at the time, it would in all likelihood not have appointed her to the post in the GDE. Further, the GDE considered that Mgijima's failure to make disclosure of what it considered to be material information constituted a gross failure on her part to comply with the standards of trust, honesty and candour required of prospective employees, particularly at the senior level of deputy director general. In

consequence, the GDE brought charges against Mgijima, dealt with by way of what is referred to as a 'pre-dismissal arbitration', conducted before the arbitrator under the auspices of the fourth respondent.

The grounds for review

[4] In these proceedings, Mgijima's representative has made much of the test established in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [1997] 12 BLLR 1097 (CC) and the applicant's failure to meet the threshold established by that test. This contention overlooks the nature of the grounds of review. The primary ground for review relied on by the GDE is a process-related attack – the GDE contends that the arbitrator failed to apply his mind properly to the true issues and to all of the evidence before him, thus committing a gross irregularity in the conduct of the proceedings and in the award, and misconduct in relation to his duties. In essence, the GDE's case amounts to an assertion that the arbitrator committed process-related errors that prevented a fair trial of the issues, resulting in material prejudice to it. In these circumstances, the outcome of the arbitration proceedings is not relevant, and the court is not called upon to make any assessment of whether the outcome (as represented by the arbitrator's decision) is one that falls within a band of decisions to which reasonable people could come on the available material. What is at issue is whether for the purposes of s 145 of the Act it can be said that the arbitrator committed a gross irregularity in the conduct of the proceedings. This is not to say that reasonableness plays no role – there is a clear link between the constitutional standard of reasonableness and the grounds of review specified in s 145. In *CUSA v Tao Ying Metal Industries* & others (2008) 29 *ILJ* 2461 (CC), Ngcobo J (as he then was) made the point in the following way, referring to paragraph [267] of the *Sidumo* judgment:

> *It is by now axiomatic that a commissioner is required to apply his or her mind to the issue properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside.*

In *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR

1128 (LC), I had occasion to say the following after a consideration of the judgments in *Sidumo (supra),Tao Ying Metal Industries (supra)* and M*inister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as* amici curiae) 2006 (2) SA 311 (CC):

> *In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification* (at paragraph [17] of the judgment).

[5] The contention that the arbitrator failed to apply his mind to the issue before him, rests primarily on the following passage in the award:

> *With the greatest of respect I do not agree that there was any duty on the employee to disclose to the interview panel and later on to the HOD that she was on suspension pending a disciplinary hearing into allegations of misconduct which were later on proffered against her. Firstly, there is a well developed principle in the South African law stating that a person remains innocent until proven guilty. Whilst I accept the employer's submission that the employee was charged with allegations of misconduct, which is common cause; the fact remains that these were mere allegations of misconduct and were not proven and the employee was not granted and (sic) opportunity to defend herself and offer a rebuttal of the charges. Thirdly, the charges were withdrawn by the Department of Arts and Culture in writing and in exchange for the employee tendering her resignation, which she duly*

did. The question posed toward the end of the interviews regarding skeletons in the cupboard /closet that allegedly placed a duty on the employee to disclose her past disciplinary record does not hold water. Firstly: apart from being vague to elicit the correct answer it is subject to different interpretations by different people. Secondly it is my view that skeletons in the cupboard could refer to two things; i.e. unproven allegations of misconduct against an employee or proven allegations of misconduct against an employee. It is my respectful view that it refers to the latter. In this particular case, apart from the fact that these were unproven allegations of misconduct against the employee, they were also subsequently withdrawn thereby effectively leaving the employee with a clean record, and consequently no duty to disclose anything to the interview panel (at paragraph [124] of the arbitration award).

[7] In my view, the arbitrator was manifestly wrong when he relied in the context of a proceeding intended to pertain to fair administrative action on the presumption that '*a person remains innocent until proven guilty'*. What was required was that Mgijima should disclose the fact that she was, at the time that she attended the interview in August 2007, on suspension pending a substantial number of charges of serious misconduct. The arbitrator appears to have understood the issue to be determined by him to be whether Mgijima was in fact guilty or not of the disciplinary charges brought against her by the DAC – that was manifestly not the case. The crucial issue – an issue that the arbitrator appears to have failed to appreciate – was Mgijima's non-disclosure of the fact that she was on suspension at the relevant time, facing disciplinary charges. It does not follow, as the arbitrator appears to have reasoned, that because Mgijima was facing '*mere allegations of misconduct'* that were not proven, that this was without significance to the GDE as her prospective employer. Equally, the fact that the charges against Mgijima were withdrawn in exchange for Mgijima's resignation did not mean, as the arbitrator appears to have understood it to mean, that the charges were of no material significance and that there was therefore no need to disclose the existence. This overlooks the fundamental point that at the time of the interview, and during the course of the negotiations on the terms of her contract, the

allegations had not been withdrawn. That came much later, once the settlement agreement was reached.

[8] In short: the crucial issue before the arbitrator was not whether Mgijima was guilty of the charges brought against her by the DAC or the materiality of those charges, but her non-disclosure at the time of her interview (and indeed during the subsequent period leading to the signing of her contract) of the fact that she was on suspension and facing serious disciplinary charges. The post for which Mgijima applied was a senior post, one that clearly required unimpeachable honesty and integrity on the part of its incumbent. Quite what effect Mgijima's conduct during the period of her employment by the DAC may have had on her suitability for appointment to the GDE was a matter for the GDE to determine. Mgijima's failure to disclose material information in response to an express invitation to do so deprived the GDE of the opportunity to make an informed decision as to the effect, if any, of the suspension and pending charges on the contemplated employment relationship.

[9] It follows that in the exercise of his functions, the arbitrator failed to apply his mind properly to the issue before him, and that in doing so, he acted other than as a reasonable decision-maker would. For this reason, the award stands to be set aside. In these circumstances, it is not necessary for me to consider the further grounds for review proffered by the applicant.

[10] In the notice of motion, the GDE seeks to have the matter referred back to the bargaining council for rehearing before another arbitrator. I was advised from the Bar when the matter was argued that while Mgijima had remained in the GDE's employ following the arbitrator's award, her employment had subsequently been terminated for reasons unrelated to these proceedings. In these circumstances, I intend simply to set aside the award. Finally, in relation to costs, there is no reason why costs should not follow the result.

I accordingly make the following order:

1. The arbitration award issued by the third respondent dated 24 May 2009 is reviewed and set aside.
2. The first and second respondents are to pay the costs of these proceedings, jointly and severally.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application 16 September 2010
Date of judgment 28 September 2010

Appearances:
For the applicant: Adv Paul Kennedy SC, with Adv P Mokoena, instructed by the state attorney
For the first respondent: Mr T Ntshebe, Hoosen and Wadiwala Inc.