REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D963/09

In the matter between:-

NDWEDWE MUNICIPALITY **Applicant**

and

GORDON SIZWESIHLE MNGADI **First Respondent**

COMMISSIONER H. NDABA NO **Second Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Third Respondent**

Heard: **8 August 2013**

Delivered: **20 December 2013.**

Summary: **Review of award – review test applied – failure of employee to comply with an instruction – reasonableness of instruction - award not reviewable.**

JUDGMENT

CELE, J

Introduction

[1] This is an application in terms of section 145 (2) of the Labour Relations Act,[1] hereinafter referred to as "the Act" in which the applicant seeks to review and set aside an arbitration award made by the second respondent under case Number KPD 030913 on 14 November 2009. The arbitration concerned the unfair dismissal of the first respondent by the applicant. The second respondent found the dismissal of the first respondent to have been procedurally fair but substantively unfair. The first respondent filed his answering affidavit late and he then sought condonation for such lateness so as to oppose the review application.

Factual Background

[2] The first respondent was employed by the applicant as Administration Manager on 1 August 2002. Among the staff that he worked with was Ms Luthuli who disappeared from work after committing various acts of misconducts against her colleagues and members of the public. That included amongst others, stealing a fellow employee's credit card and using it for her own benefit. She was criminally prosecuted for this act of fraud. She pleaded guilty and received a sentence of a fine or two years imprisonment suspended for five years. She, subsequently, referred an unfair dismissal dispute. The dispute was resolved in her favour by way of a settlement agreement after the applicant conceded that it had failed to follow due process before dismissing her.

[3] On her return to work, the Executive Council of the Municipality resolved to reinstate her in her position at work. Her father was a member of the Municipal Council. The Municipal Manager, Mr Phakama Mhlongo, delegated the duty to carry out the re-instatement to the Human Resources Manager, Mr Bhekithemba Buthelezi. He delegated the task further to the first respondent who duly placed her with other general workers. That was in line with a decision of the Management Committee of the applicant which felt that it would be unethical to place her at the registry and reception areas she had

[1] Act No 66 of 1995.

been at, when she committed the fraud and thereafter absconded. Ms Luthuli was not happy with that placement and she apparently lodged a grievance through her union, averring that she had to continue with duties she performed prior to her dismissal. The applicant never disciplined her for those acts of misconduct before and after her return to work and yet insisted that Ms Luthuli be placed where she could resume her old duties. The first respondent was reluctant to carry out the instruction as he felt that the staff would be vulnerable to further criminal activities by Ms Luthuli.

[4] In one of the meetings held, the issue of the proper placement of Ms Luthuli came for a discussion between the first respondent, Mr Mhlongo and other officials. The first respondent indicated that it was against his conscience to re-instate Ms Luthuli to her previous position after she had defrauded her colleague and had also taken a customer's money. Tempers were then raised and the first respondent might have said that he would rather be dismissed than re-instate Ms Luthuli to her previous post. It was in August 2008 that the first respondent was given the instruction. Mr Mhlongo then issued three letters dated 12, 15 and 17 September 2008, putting the first respondent on terms to comply with the instruction to place Ms Luthuli in a position where she could do her work in terms of her contractual duties.

[5] On 18 September 2008, the applicant took the position that the first respondent was not complying with its instruction to place Ms Luthuli and it suspended him. It also charged him with insubordination to the instruction of Mr Mhlongo, given in August 2008, in that he had refused to comply with it and that he instead shouted back at Mr Mhlongo. Also, on 18 September 2008, the first respondent telephoned Mr Simphiwe Zondi who was also a colleague of his and told him that he (first respondent) had been suspended. On 19 September 2008, Mr Zondi told Ms Luthuli to report at his office, where she was placed in compliance with the given instruction. The first respondent was found guilty and was dismissed. He referred an unfair dismissal dispute for conciliation and later for arbitration. The second respondent was appointed to arbitrate the dispute. He found the dismissal to have been substantively unfair and he ordered the applicant to compensate the first respondent in an

amount of money equivalent to 12 months of the salary that he earned on the date of his dismissal.

Chief findings of the second respondent

[6] The second respondent concluded that it was clear to him that the first respondent had refused to remove Ms Luthuli from the hall where she was initially placed and therefore that he had refused to carry out the instruction during August 2008. He was not satisfied of the evidence relating to the charge of shouting at Mr Mhlongo but found that the refusal to carry the instruction constituted aggression on its own. As to the allegation that the instruction was carried out on 16 September 2008, the second respondent found that the instruction given in August 2008 was still not carried out. The delay in charging the first respondent was a procedural issue. He found that the Executive Council acted in compliance with clause 5.3 of its Disciplinary Policy and therefore properly to re-instate Ms Luthuli. He found that in terms of clause 5.1 of the Policy, Ms Luthuli should have been charged with misconduct of stealing a credit card of a fellow employee so as to strengthen perception that it was acting with fairness, consistency, honesty, integrity and with a concern over the safe work environment for its employees.

[7] In his view, it was unreasonable to place Ms Luthuli back at work without charging her. He held that the employer had a responsibility to ensure a safe working place for its employees and so by placing her back at work without charging her it created a unsafe workplace for its employees whether at the cash hall or in Mr Zondi's office. He said that a failure to charge Ms Luthuli raised the question whether other employees committing misconduct such as of theft would also go unpunished thus created a difficulty for the applicant to be consistent to its staff in future. He, therefore, found it unreasonable to place Ms Luthuli at the cash hall or in Mr Zondi's office without charging her. He opined that a refusal by the first respondent to place Ms Luthuli without charging her could not amount to a breach of contract of his employment as it was tantamount to assisting the Municipal Manager in creating a perception that if one employee stole at work when she or he returned instead of being charged he or she would be safely placed in Mr Zondi's office or any suitable

office. He thus found the dismissal of the first respondent to have been substantively unfair.

Grounds for review

[8] Various submission were made by the applicant as grounds for review which may be summed up as that the second respondent's award was irrational and was one which a reasonable decision maker could not reach for the following reasons:-

1. He failed dismally to identify the issue to be decided alternatively whereas the issue was identified for him during the arbitration, the Commissioner decided the matter on an incorrect issue. The decision of the Commissioner is not rationally connected to the evidence which was properly placed before him.

2. Whereas the employee's case was that he complied with the instruction before he was suspended and ultimately dismissed, the Commissioner decided the matter on the basis that the instruction itself was unreasonable as it created an incorrect perception.

3. It is the applicant's case that the instruction that was issued to the employee could not possibly have been unreasonable because the unchallenged evidence of Mr Mhlongo was that he was not prescriptive as to where Ms Luthuli was to be placed so long as she was able to perform her duties as per her job description.

4. The instructions given to the employee was a blanket instruction intended for the employee to allow Ms Luthuli to carry out her functions as per her job description. In addition to that, Mr Mhlongo was fully aware that Ms Luthuli had a previous conviction which had a suspended sentence deterring her from committing acts of criminality in the future.

5. It is the applicant's submission that the crux of this matter was whether or not the instruction given to the employee was carried out.

6. Whereas at some stage the employee's defense was double barrel in a sense that initially his defense was that the instruction was unreasonable and unethical that appeared to have changed as the case progressed. His defense was now that the instruction was in fact carried out as at the time when he was suspended. Accordingly, the ultimate decision had to be made on whether the instruction was carried as at the time of suspension or not. The Commissioner failed to decide on that issue but appeared to hallucinate over the issue of the reasonable or unreasonableness of the instruction itself. A defense long abandoned by the employee. To this, it is submitted that the Commissioner's award is unreasonable and no reasonable decision-maker could have made it.

7. Had the Commissioner correctly identified the issue and decided what the issue before him was, he would have found that in actual fact as at the time when the Employee was suspended he had not complied with the instruction. This is borne out in the evidence of Mr. Zondi who was called as the employee witness.

8. The Commissioner identifies the following issues:-

   (i) Whether the first respondent eventually carried the instruction out on the 16th of September 2008;

   (ii) Whether the instruction was lawful and reasonable;

   (iii) Why it would be unreasonable to place Ms Luthuli at the hall without charging her;

   (iv) Why it would be unreasonable to place Ms Luthuli in Mr Zondi's office.

9. The only issue for consideration was the first one which the Commissioner did not say anything about. The other issues were irrelevant. Ms Luthuli was placed in Mr Zondi's office and had been there with no problems as at the time of the arbitration.

10. It was that misdirection which rendered the Commissioners award reviewable on the basis of unreasonableness as he did not, at all, deal with the aspect of the evidence which he himself conceded was the crux of the matter. The Commissioner failed to properly apply his mind to the evidence properly placed before him and made findings which were not rational and justifiable in relation to the evidence presented to him. As a result thereof he failed to exercise his duties as an arbitrator and came to a decision which no reasonable decision maker could arrive at.

11. It was apparent that the Commissioner decided the matter squarely on the basis of the reasonableness of the instruction. However, even when one interrogated that finding it could be seen that the Commissioner misdirected himself because it was not upon the employee to refuse to carry out instruction to force management to take action against another employee. That in itself was a repudiation of the contract of employment. Any refusal to carry out work is a repudiation of an employment contract. The employee in this instance did not know if Ms Luthuli was going to be subjected to discipline afterwards. He simply refused to carry out this instruction and in actual fact his refusal was so gross that the only sanction suitable for him was that of dismissal. The tone used in his correspondence was a gross in subordination and was a serious indictment to the office and stature of the Acting Municipal Manager who was the most senior employee of the applicant. The arbitration award was liable to being reviewed and set aside and to be replaced with an order that the dismissal of the first respondent was substantively fair.

The condonation application

[9] Every condonation application entails the consideration of various factors in respect of which the law has become trite.[2] In the case of *Van Wyk v Unitas Hospital and Another*[3] the Constitutional Court held that:

> 'This Court has held that the standard for considering an Application for Condonation is the interest of justice. Whether it is in the interest of justice to grant Condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effects of the delay on the administration of justice and other litigants, the reasonableness of the explanation of the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.'

[10] In paragraph 22 of *Van Wyk's* case (*supra*) the Constitutional Court further held that:-

> 'An Applicant for Condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And what is more, the explanation given must be reasonable.'

[11] The first respondent filed his answering affidavit on 9 September 2010 with a condonation application. He stated that the period of the delay was not so excessive being 51 days and when seen against the explanation and the prospects of success. The record of the arbitration proceedings and the supplementary affidavit were served on the first respondent's representative on 10 June 2010. There is no indication that the applicant either simultaneously or subsequently filed the rule 7A (8) notice as an invite to any respondent who wishes to oppose the application to file opposing papers within a stipulated time, which is 10 days. Accordingly, the first respondent was not put in terms in the event he wanted to oppose the review application. However, on 13 July 2010, applicant's legal representative wrote a letter to first respondent's representative, alerting him that the opposing papers were due and gave the first respondent five days to deliver the same. A response

[2] See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F, *Chetty v Law Society, Transvaal* 1985 (2) 756 (A) at 765D-E and *Moila v Shai NO and Others* 2007 ILJ 1028 (LAC) at para 35.
[3] 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.

came from the first respondent's representative, erroneously dated 14 June 2010, instead of 14 July 2010, indicating that they were busy with the opposing affidavit. That letter has the effect of remedying the defect in the rule 7A (8) notice and therefore the time for the filing of the answering affidavit should be calculated from the date of 13 July 2010, when the applicant's letter was received by the first respondent. The period of the delay is therefore 51 days minus 13 days which is 38 days.

[12] The explanation for the delay given is that the first respondent could not timeously be contacted by his representative to depose to the answering affidavit. He said that, upon his dismissal the applicant took the cellular telephone back which he had used as his working tool. He had given the union officials the cellular telephone number through which they could contact him and in its absence they had no means of contacting him until it was late.

[13] He believed that he had good prospects of success in that the award was devoid of any defect and when all evidence led was considered, the award was reasonable. In his view, the applicant could not suffer any prejudice should condonation be granted.

[14] The condonation application was opposed by the applicant. Further to that the first respondent has not filed any reply to the applicant's opposing affidavit. It is trite law that in circumstances such as these where an applicant (first respondent in this incidence) fails to reply to the opposition the Court may decide the matter on the version of the respondent, (the applicant) where there is a dispute of facts between the parties.[4]

[15] The applicant wrote some letters urging the first respondent to file opposing papers and in response to those letters the union official stated, firstly, it was busy with the opposing affidavit, without indicating any difficulty there might have been in tracing the first respondent. In response to another letter, the union official asked for an extension of time citing study pressures. The applicant agreed to such time extension. When the applicant persisted that the extended time had long expired, the reason for the delay given was then

[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*. 1984 (3) SA 623 (A) at 634 E-635C.

that the union official had been busy with arbitrations and that she was then on leave. According to the applicant, the cellular telephone was indeed claimed from the first respondent but he returned it in February 2010.

[16] An application for condonation stands and falls with the explanation given. Where the explanation is no explanation at all, *inter alia*, because it is false, the Court does not have to consider the prospects of success and the other factors.[5] The explanations given by the union officials in letters addressed to the applicant amount to a contradiction to the statement proffered in the answering affidavit. If it should be true that the first respondent could not communicate with the union officials because they did not have his recent telephone number, it must follow that it is a lie that, in July 2010, the union was busy with the opposing affidavit. Similarly, the lack of communication had nothing to do with the union official who might have been busy with arbitrations or was on leave. Wherever the truth lies, the explanation for the delay has not been shown to be probably true. The explanation tendered is, accordingly, dismissed for being improbable and unreasonable. I need not consider the prospects of success or any other factors.

[17] The application for condonation is, accordingly, dismissed and the review application proceeds unopposed.

The review application

Evaluation

[18] Section 145 of the Act on which this application is premised and to the extent relevant here states that:

> '(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award.
>
> (2) A defect referred to in subsection (1) means –
>
> (a) that the commissioner-

[5] See *Moila v Shai* case (*supra*) at para 37.

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings;

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.'

[19] The proper test for reviewability is the one that was set out in *Sidumo v Rustenburg Platinum Mines*,[6] namely: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?' In determining the reasonableness of an arbitrator's award, the Court is entitled to have regard to other reasons, not relied on by the arbitrator, to determine whether such decision is reasonable. In *Fidelity Cash Management Service v CCMA,*[7] the Labour Appeal Court stated in relation to the *Sidumo* test that:

> '…there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend – at least solely – upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account.'

[20] In *Edcon Ltd v Pillemer NO,*[8] it was held, *inter alia*, that:

> 'It is therefore the reasonableness of the award that becomes the focal point of the enquiry and in determining this one focuses not only on the conclusion arrived at but also on the material that was before the commissioner when making the award.'

[21] Then in *Herholdt v Nedbank Ltd*,[9] Court held that:

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[6] (2007) 28 ILJ 2405 and [2007] 12 BLLR 1097 (CC) at para 110.
[7] (2008) 29 ILJ 964 (LAC), at para 102.
[8] (2009) 30 ILJ 2642 (SCA) at para 16.

> '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 inquiry 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.'

[22] For this application to succeed, the second respondent must be shown to have committed a defect as alleged or he must have arrived at an unreasonable result, for instance by misconceived the nature of the inquiry he was to determine. The result will be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before him. According to the applicant's submissions, the employee's case was that he complied with the instruction before he was suspended and ultimately dismissed and that the Commissioner decided the matter on the basis that the instruction itself was unreasonable as it created an incorrect perception. The applicant's case is that the instruction that was issued to the employee could not possibly have been unreasonable because the unchallenged evidence of Mr Mhlongo was that he was not prescriptive as to where Ms Luthuli was to be placed so long as she was able to perform her duties as per her job description.

[23] The second respondent found with no difficulty that the instruction issued to the first respondent in August 2008 was not complied with. In terms of schedule 8 of the Act, the second respondent had then to determine whether the rule contravened was valid or reasonable. He had to consider all evidential material that was before him for this purpose. At the commencement of the arbitration hearing, the second respondent spent what may be described as an inordinate time (taking the whole of volume 1 of the arbitration hearing) with the parties, pointing out the difficulty there was in accommodating Ms

[9] 2013 (6) SA 224 (SCA) at para 25.

Luthuli's concerns about her correct placement after she was proved in a court of law to have been either a thief or a fraudster. The representative of the applicant went to the extent of undertaking to address the very issue when leading the evidence.

[24] The commissioner set out to determine the reasonableness of correctly placing a reinstated employee that could not be trusted. She had been convicted and sentenced on very serious crimes of dishonesty perpetrated against the very people she had to work and relate to. While the first respondent was the Manager and had the power to recommend disciplinary steps against the staff reporting to him, the decision taken to re-instate Ms Luthuli was taken by the body representing the employer. Re-instatement was taken without, simultaneously resolving to discipline her. Ms Luthuli's father was a member of that body which ultimately represented the applicant, being the employer.

[25] In my view, the second respondent had to determine the reasonableness of the proper placement of Ms Luthuli, as opposed to the mere re-instatement which had already been carried out. Even her attitude to insist on being placed where she wanted did not help to evince that she was remorseful for her misdeeds and was in the process of repenting from her ways. She wanted to be re-instated in her own terms under very difficult and challenging circumstances. She succeeded to have the last say at the expense of another employee whose job she has "stolen". As it was always open to the applicant to lead evidence on the reasonableness of the correct placement of Ms Luthuli, the second respondent did not commit any defect as defined in section 145 of the Act.

[26] This matter is the first example of the difficulty faced by the applicant in acting consistently in the imposition of a fair sanction on its employees found guilty of misconduct. The applicant has condoned a criminal who has been proved to be dishonest and yet has been intolerant of an employee who failed to carry out an instruction. Ms Luthuli committed crimes at her workplace and the applicant accepted her with no disciplinary action and yet the applicant dismissed an employee for a failure to carry out an instruction under dubious

circumstances. All evidence led considered, it has not been shown that the second respondent issued an award which a reasonable decision maker could not issue in all circumstances.

[27] Consequently, the following order stands to be issued:

1. Condonation for the late filing of the answering affidavit is dismissed with no costs order made in respect thereof.
2. The review application in this matter is dismissed
3. No costs order is made.

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Cele J

Judge of the Labour Court.

APPEARANCES:

For the Applicant: Mr S Mhlanga of Mhlanga Inc.

For the First Respondent: Ms N Cele of Imatu, KZN Region.