IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 39/16

In the matter between:

J K MHLANGA	**First Appellant**
SAMWU	**Second Appellant**
and	
RAND WATER	**First Respondent**
FATEMAH SHAIK	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

Heard: **14 February and 29 March 2017**

Delivered: **18 May 2017**

Summary: The employee was charged with four infractions and dismissed. A commissioner found that the employee was guilty of only two infractions that did not justify a fair dismissal. On review the Labour Court found that the employee was guilty of a third infraction and found that the dismissal was fair. On appeal the court found that in terms of the disciplinary code that had been properly proven, the conduct of the employee did not constitute the third infraction and upheld the appeal.

Coram: Tlaletsi DJP, Landman JA, and Kathree-Setiloane AJA

Neutral citation: **Mhlangu and Another v Rand Water and Others** (LAC 39/16)

JUDGMENT

LANDMAN JA

[1] Mr J K Mhlanga and SAMWU (the first and second appellants) appeal against the judgment of the Labour Court (Lagrange J) delivered on 4 September 2015 in terms of which an award of a Commissioner of the Commission for Conciliation, Mediation and Arbitration (the second and third respondents) relating to the dismissal of the first appellant by Rand Water (the first respondent) was reviewed and the sanction set aside and replaced with an award dismissing the first appellant. The appeal is with leave of the court *a quo*.

Condonation

[2] Leave to appeal was granted on 5 April 2016. This meant that the record should have been filed by 5 July 2016. The appellants filed a notice of appeal on 26 April 2016. The appellants' attorney said that, in early May, he instructed his associate to prepare the record. She informed him that the last date for filing the record was 22 July. He accepted that this was correct. The record was filed on 19 July 2016. The Registrar informed his associate that it was out of time and should have been filed by 5 July. As regards the prospects of success, the attorneys ask that the papers filed in support of the application for leave to appeal and the appeal be read as if they had been attached to the application for condonation. He submitted that the appellants have good prospects of success. The delay in filing the record is some 10 days.

[3] Although the first respondent initially opposed the application for condonation, the first respondent abandoned this when the appeal was called. It remains to consider whether the appellant has reasonable prospects of success and it is to the merits that I turn.

The facts

[4] The first appellant was employed by Rand Water as a mechanical foreman. This is a senior position. He was charged with four offences, found guilty and dismissed on 5 December 2012. The Commissioner found that the first respondent had only proved that the first appellant was guilty on charges 2(b) and 2(c). This appeal also concerns charge 2(d). It is desirable to set out charge 2 in its entirety. It reads:

> '(a) [You] failed to provide an advice note for the removal of the following items ie:
>
> Hydraulic Jacks (7), generator (1), grinders (2), and an impact wrench (1).
>
> (b) You failed to provide the advice note of the above items to procurement section to enable them to source suppliers to quote on these items;
>
> (c) You failed to send the faulty equipment i.e.:
>
> Hydraulic Jacks (7), generator (1), grinders (2), and an impact wrench (1) to the Electrical Section for repairs.
>
> (d) You submitted three quotations for the installation of a sampling point at Zuurbekom well number 8 to the procurement section without involving the buyers in this process.'

The award on review

[5] The court *a quo* was satisfied with the finding by the Commissioner that the appellant was guilty of charges 2(b) and (c). The court *a quo*, however, found that the Commissioner had overlooked the provisions of paragraph 6. 10. 1. 1 (d) of the Company's Procurement Policy ('the policy') and added that the appellants' representative at the arbitration had read out this provision in such a way that a reference to the buyer had been omitted. The court *a quo* was satisfied that the appellant was also guilty on charge 2(d).

Evaluation

[6] The first appellant's case, on this point, is that he had complied with the terms of the policy and that the policy did not require the involvement of the buyer in sourcing suppliers for emergency work. This version was put to the first respondent's witness Mr Mogorosi, the forensic investigator. The Commissioner and the witness were referred to the extract from the policy in the first appellant's bundle and it was read into the record, correctly, by the appellants' legal representative. The relevant page of the policy is marked "Rev. No. 00". Paragraph 6. 10. 1. 1 (d) reads:

> 'The requestor can then source the market and adjudicate on a service provider and then request goods/services with the selected service provider.' (My emphasis. Note that the appellant was the requestor.)

[7] On this version, the first appellant, as the requestor, was not enjoined to involve the buyer in sourcing goods or services.

[8] The court *a quo* did not refer to this extract (Rev. No. 00) from the policy. Instead, it relied on the policy contained in the first respondent's bundle that had also been referred to in evidence. There the relevant page is marked "Rev No. 02". This is a later version. Clause 6. 10. 1. 1 (d) reads as follows:

> 'The requestor and buyer can then source the market and adjudicate on a service provider and then request goods/services with the selected service provider'. (My emphasis.)

[9] The difference in versions explains why the court *a quo* was of the view that the appellants' representative had admitted reading a crucial word in paragraph (d) of the Policy.

[10] However, as Mr Matebese, who appeared for the appellants, pointed out, the employer's version marked "Rev No. 02" itself states that it is effective as from 10 November 2012. This means that this policy was not in force at the time the charges against the first appellant were drawn on 5 April 2012. There may have been a previous version in force but there is no evidence as to its content. This leaves us with the extract marked "Rev No. 00" upon which the first appellant relies. On the basis of this version of the policy, the first appellant was not required to involve a buyer in the procurement process. This means that the court *a quo*'s finding that the first appellant should have been found guilty on charge 2(d) is based on a misapprehension and falls to be set aside.

[11] Mr Boda SC, who appeared for the first respondent, submitted that the first appellant could still be found guilty on charge 2(d), if construed broadly, because the procurement process was not instituted in an emergency as the work had been done 20 days before the process was instituted and one supplier had provided the three quotations required. These points may have been fruitfully raised had the first respondent lodged a cross-appeal, but in its absence, they may not be taken into account.

Sanction

[12] In considering the issue of the appropriate sanction, the court *a quo* remarked at paragraph 26 that:

> 'In considering the appropriate sanction, the arbitrator noted that both charges 2(b) and 2(c) categorised as Schedule A offences, amounting to a failure to observe company policies and procedures. In terms of the company's own disciplinary code and grievance procedure, an employee guilty of such an offence may be formerly counselled or issued with a warning. In the circumstances, she held that [dismissal for] committing a "Schedule A offence is not necessarily appropriate". She further accepted that Mhlangu held a position of trust but there was no indication that continuing the employment relationship would be intolerable and accordingly dismissal was not appropriate as a sanction. For the same reason, there was no bar to reinstatement as a remedy.'

[13] The court *quo* remarked, *inter-alia*, in paragraph 27:

> 'The arbitrator only found him guilty of charges 2(b) and (c) which arguably were not serious enough to warrant dismissal on their own.'

[14] However, by finding that the first appellant was also guilty on charge 2(d) the court reconsidered the sanction and decided that the dismissal was an appropriate sanction. Now that the charge 2(d) has fallen away, I am of the view that the Commissioner's sanction as regards charges 2(b) and (c) was a reasonable one, and it should stand.

Costs

[15] It seems to me that costs should follow the result.

Order

[16] In the premises, I make the following order:

1. Condonation for the late filing of the record is granted and the appeal is reinstated.

2. The appeal is upheld.

3. The order of the court *a quo* is amended to read:

> '1. The application to review and set aside the award of the third respondent is dismissed.
>
> 2. There is no order as to costs.'

4. The first respondent is to pay the appellants' costs of the appeal.

AA Landman

Judge of the Labour Appeal Court

Tlaletsi DJP and F Kathree-Setiloane concur in the judgment of Landman JA

APPEARANCES:

FOR THE APPELLANTS:	Adv ZZ Matebese
	Instructed by Maenetja Attorneys
FOR THE FIRST RESPONDENT:	Adv F A Boda SC
	Instructed by Cliffe Dekker Hofmeyer Inc