REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: JR 1973/ 12

In the matter between:

GAUTENG DEPARTMENT OF EDUCATION **Applicant**

and

MS N CAWE **First Respondent**

THE EDUCATION LABOUR RELATIONS

COUNCIL **Second Respondent**

BRENT SAUNDERS **Third Respondent**

Heard: **6 March 2014**

Delivered: **16 May 2017**

Summary: **An arbitration is a hearing *de novo.* An arbitrator who reviews the decision of the chairperson of a disciplinary enquiry commits a gross irregularity which renders his or her award susceptible to review.**

JUDGMENT

LALLIE J

Introduction

[1] This is an application to review and set aside an arbitration award of the first respondent ("the arbitrator") in which she found the third respondent's dismissal by the applicant unfair and ordered his reinstatement which should have been effected on 1 August 2012. It is opposed by the third respondent. The record of the arbitration proceedings remains incomplete notwithstanding the order of the Labour Appeal Court that it be finalised. I accepted that the applicant elected to rely on the filed portion of the record.

Factual background

[2] The facts of this matter are mostly common cause. They are that the third respondent was employed as an educator on 1 January 1989 until his dismissal on 28 February 2012 at a time he was the deputy headmaster of the Parktown Boys High School ("the school"). Mr Hayward ("Hayward") made a donation of R15 000.00 to the school for the purpose of purchasing a golf cart. The third respondent added an amount of R3 000.00 from his own funds and the golf cart was duly purchased and branded with the school's markings and logo. It was used by the third respondent in the performance of his duties. In February 2011, four boys took the golf cart without authority and rode it in the school premises. They crashed it and it was damaged beyond repair. The third respondent reported the incident at the Parkview Police Station ("the police station") to obtain a case number for an insurance claim. The investigating officer decided that a criminal charge should be laid against the boys. The School Governing Body ("SGB") took disciplinary action against the boys. The boys were found guilty of misconduct but were not required to reimburse the school for the loss of the golf cart. The third respondent realised that the golf cart had not been placed on the school's asset register and was therefore not covered by the school's insurance policy.

[3] The boys' parents approach the investigating officer who arranged a meeting between them and the third respondent. At the meeting which was held at the school during school hours, the third respondent falsely represented that he was the owner of the golf cart and asked the parents to reimburse him for his

loss. Based on the quotations which the parents had brought to the meeting a decision that they would collectively contribute an amount of R38 000.00 to replace the golf cart was taken. The third respondent asked them to deposit the money in his personal bank account by 15 April 2012. The money was deposited a few days after the said date. The third respondent purchased a replacement golf cart for the sum of R59 000.00 having paid the difference from his own funds. He had it branded with the school logo and authorised that it be placed on the school's asset register and the necessary insurance cover obtained. When Hayward got wind of what had happened to the golf cart, he confronted the third respondent. The golf cart was sold on the instructions of the SGB. It fetched an amount of R47 000.00 from which the parents were reimbursed and the rest was given to the third respondent who suffered the loss of R12 000.00.

[4] An investigation was conducted into the third respondent's conduct leading to the following charge being preferred against him:

> 'It is alleged that you committed an act of dishonesty in that you received an amount of R38 000.00 from parents of Mzwakhe Mthethwa, Kabelo Mothibeli, Kopano Makgalemele and Sifiso Yende for golf cart (sic) belonging to Parktown Boys High School damaged by the said learners in that you convinced the parents that the golf cart belonged to you not the school.
>
> In view of your actions you are thus charged with misconduct in terms of section 18 (1) (ee) of the Employment of Educators Act, 77 of 1998 as amended'.

[5] The chairperson of the disciplinary enquiry that ensued found him guilty and issued the sanction of dismissal. He appealed but his appeal was dismissed.

The award

[6] Giving reasons for her decision, the arbitrator shared the third respondent's view that the directory discretionary power to dismiss under section 18 (5) of the Employment of Educators Act ("EEA") is to be contrasted with the provisions of section 17. The intention of the legislature was said to be to seek to provide a broad set of penalties for offences in breach of section 18, but in

each case suited to the facts of the case. She attacked the chairperson for preferring a pro forma approach to the hearing and finding the third respondent automatically guilty of fraud after he had pleaded guilty of dishonesty, without indicating how she reached her verdict. A further attack on the chairperson was mounted on her failure to take into account the code of good practice in cases of misconduct contemplated in section 18 of the EEA. She added that had the chairperson considered how the third respondent utilised the golf cart she would have come to a different conclusion. The arbitrator considered the testimonials of the school staff as well as a letter from the principal and concluded that had the third respondent been a fraudster, his colleagues would not have written testimonials in his favour. She was not convinced that the third respondent had made himself, guilty of gross dishonesty as he used the golf cart only to conduct the business of the school. She relied on the decision in the *Nedcor Bank LTD v Frank en andere*[1] where it was held that dismissible acts of dishonesty require an intention to prejudice the employer. She concluded that the third respondent's actions did not prejudice the applicant.

[7] The arbitrator found that the evidence on which a number of the chairperson's findings were based was not tendered at the arbitration. She took into account that the third respondent did not appropriate to himself the money paid by the parents. She found that the applicant failed to adduce evidence to prove that it treated other employees who had committed similar misconduct the same way it had treated the third respondent. She was not convinced that the applicant had proved its case. In conclusion, the arbitrator stated that in arriving at her decision, she had regard to the relevant case law which illustrate circumstances in which interference with administrative decisions is permissible. She cited a number of decisions which deal with interference with administrative decisions. She expressed her satisfaction that there was ample basis to find that the applicant acted irrationally and failed to apply its mind to the case. She found that there was evidence of cogent reasons for the administrative decision to be interfered with. The sanction of dismissal which, in the arbitrator's view, was not based on a strict analysis and application of

[1] (2002) 23 ILJ 1243 (LAC)

the law to the facts of the case stood to be overturned. She reinstated the third respondent to his previous position. She ordered the applicant to pay the third respondent an amount of R66 999. 00 in terms of the reinstatement order having taken into account that he was guilty of the misconduct which led to his dismissal for which he had to be sanctioned.

Grounds for review

[8] The applicant submitted that the arbitrator committed gross irregularities which rendered her award susceptible to review. She approached the arbitration as though she was sitting as a court reviewing and setting aside the chairperson's decision instead of determining the fairness of the third respondent's dismissal *de novo*. She incorrectly treated the chairperson's decision dismissing the third respondent as an administrative decision. She misdirected herself by concentrating on the purpose for which the golf cart was used instead of focusing on his dishonesty and all the lies he told to maintain it. She took into account inadmissible opinion of testimonials written by the third respondent's colleagues. She relied on irrelevant authority and disregarded relevant cases. She failed to consider provisions of section 193 of the Labour Relations Act to 66 of 1995 ("the LRA") when dealing with relief due to the third respondent. The applicant expressed the view that all these irregularities led the arbitrator to reach an unreasonable decision.

[9] The gist of the third respondent's case is that the arbitrator's decision is unassailable. He submitted that the chairperson's decision was wrong and based on a complete misconception of the facts and constituted a fundamental misdirection that it cannot be sustained or reasonably defended. He justified his conduct. He submitted that the arbitrator conducted a hearing *de novo* which was not affected by reference to authority on reviews. Justifying his version that the award is reasonable, the third respondent submitted that the applicant led no evidence on the breakdown of the trust relationship while he led evidence that both the principal and staff of the school are still willing to work with.

[10] An arbitration award may be reviewed if the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings. A defect will constitute a gross irregularity as contemplated by section 145 (2) (a) (ii) of the LRA when the arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result. In this regard see *Herholdt v Nedbank (Congress of South African Trade union as Amicus Curiae)*[2] An arbitrator misconceives the nature of the enquiry when he or she has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner.

[11] The applicant's first ground for review is consistent with the *Herholdt* decision (*supra*). I have deliberately referred extensively to the arbitration award with the view of illustrating that the arbitrator misconceived the nature of the dispute before her because she undertook the enquiry in the wrong manner. The arbitrator was enjoined by section 138 of the LRA to determine whether the third respondent's dismissal was substantively and procedurally fair. In *National Commissioner, SAPS v Myers and Others*[3] the court referred with approval to *County Fair Foods (Pty) Ltd v CCMA and Others*[4] in deciding that the legal position is that the proceedings before the commissioner take the form of a hearing *de novo*. The findings of an earlier disciplinary enquiry were found to be irrelevant and not binding on the commissioner who is called upon to arbitrate the dispute. A reading of the award clearly illustrates how the arbitrator did not conduct the arbitration as a hearing *de novo.* She reviewed the disciplinary proceedings. She attacked the manner in which the chairperson conducted the disciplinary enquiry. The only inference that can be drawn from her reliance on principles and decisions which deal with review of administrative decisions is that she erroneously sat as a review tribunal.

[12] The arbitrator's conclusion eliminates every doubt that she did not conduct a hearing *de novo* in that she relies on case law which deals with instances when not to interfere with an administrative decision. As the applicant correctly pointed out the Constitutional Court has held that decisions taken by the State as an employer which include decisions of chairpersons of

[2] [2013] 11 BLLR 1074 (SCA) at para [25].
[3] [2012] 7 BLLR 688 (LAC) at para 42
[4](1999) 20 ILJ 1701 (LAC)

disciplinary enquiries do not constitute administrative action. Consistent with the conduct of review applications, the arbitrator finds that the applicant acted irrationally and failed to apply its mind to the case. Instead of enquiring *de novo* into the fairness of the third respondent's dismissal, based on her sense of fairness, the arbitrator decided to review the decision of the chairperson of the disciplinary enquiry. Her decision therefore stands to be reviewed and set aside on the grounds that she committed a gross irregularity by undertaking the enquiry in the wrong manner. As the arbitration record is incomplete, remitting the matter to the second respondent is appropriate.

[13] In the premises, the following order is made:

13.1 The arbitration award issued by the first respondent under case number PSES717 – 11/12 GP is reviewed and set aside.

13.2 The matter is remitted to the second respondent to be arbitrated *de novo* by an arbitrator other than the first respondent.

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Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Cassim SC with Advocate Rajah

Instructed by: The State Attorney

For the Third Respondent: Advocate Krause