Sneller Verbatim/HVDM

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J6197/00

2002-12-11

In the matter between

THE PREMIER OF GAUTENG Applicant

and

ADV N C MDLADLA Respondent

J U D G M E N T

LANDMAN J: Mr N E Malgas was employed as a director in the office of the premier of the Gauteng Province. His immediate supervisor, the chief director, was Ms Sadic. There was tension between then. Ms Sadic had complained to the acting

director-general, Mr Bolton, about Mr Malgas. It has been felt necessary for a labour relations officer to sit in on their "one on one" meetings. Mr Malgas had in turned complained to Mr Bolton about Ms Sadic. A staff meeting concerning *inter alia* job descriptions was to be held in Mr Malgas' department. A meeting was duly convened. Ms Sadic sent her secretary to the meeting to apologise that she had other business but that she would try to attend the meeting. The secretary also gave a memo to Mr Malgas for distribution to the staff members present. While Mr Malgas was addressing the meeting Ms Sadic arrived. An incident occurred. This led to charges begin preferred against Mr Malgas. He was charged with the following:

"1. That he physically assaulted his immediate supervisor, Ms S Sadic, in front of other members of staff by laying his hands upon her shoulders and forcefully attempting to push her towards the door.

2. That he conducted himself in a disgraceful and unbecoming manner."

Mr Patlela, an attorney, an AMSA panellist was appointed to chair a disciplinary inquiry. In the course of the inquiry he found Mr Malgas to be guilty and recommended that he be

dismissed from the service.

Subsequently Mr Malgas was dismissed. He was unhappy with this and referred the dispute to the Public Sectorial Bargaining Council. The dispute was arbitrated by the first respondent. She found that his dismissal was substantively and procedurally unfair. She awarded him compensation in an amount equivalent to ten months' remuneration. The premier's office seeks to review and set aside the award.

The arbitrator heard the evidence and witnessed the demonstration of the assault. The arbitrator was satisfied Mr Malgas had committed the misconduct. The arbitrator's finding of the assault differed from that described by the disciplinary tribunal in so far as it was not found that Mr Malgas had pushed Ms Sadic towards the door. The arbitrator found that he had ushered her to the door, in so doing that he had touched her. He did so with the necessary intent to make his actions constitute an assault according to our law. There is nothing irregular about this finding of the arbitrator and of the grounds arrived upon avail the premier's office.

Can it be argued that the findings were erroneous? The answer is that this is not an appeal and the award which was

made pursuant to the Arbitration Act 42 of 1965 is not open to the challenge on the basis of the justifiability test which is applicable to awards brought in terms of section 145 of the Labour Relations Act 66 of 1995.

Was the dismissal substantively and procedurally fair? The key to this lies in the arbitrator's finding that the disciplinary inquiry was procedurally defective. The arbitrator finds this to be so for the following reasons: The premier invoked the services of an independent person to chair the disciplinary inquiry. This she found was in conflict with the applicable code. She goes on to say: The disciplinary code in the public service is a collective agreement between the unions that are party to it and the public service as an employer. As such the employer does not have to alter or to deviate from it without consulting the affected party. Though there is a provision in it that allows such deviance the respondent should have informed the applicant the extent at which it intended to deviate from its code, so as to give him the opportunity to select from a list of names proposed for chairing his disciplinary hearing (sic).

Both parties should have agreed on the chairperson since the procedures laid down in the code was not followed.

The unilateral decision of the respondent led to the allegation of bias. For procedural fairness to prevail the rules of natural justice should be applied. There are two rules of natural justice - rule against bias *nemo judics sue causa*(?) and the rule to give the other party the opportunity to be heard (*aure alteram partum(?)*. Where the employer envisages an inquiry the chairperson of that inquiry should be an independent unbiased person. The test of bias is whether the reasonable lay observer would gain the impression that there is a likelihood of bias (*Baxter* 1989:324).

Now in the absence of the agreement between the applicant (the then accused) and the employer to choose the chairperson wouldn't a reasonable lay observer have gained the impression that there is a real likelihood of bias on the part of the chairperson whom the employer has chosen, take into consideration the nature of the charges and the relationship between the victim and the applicant (the then accused) and the fact that they (the chairperson, the complainant and the victim) were of the same racial group and chairperson was an outsider? The answer to this is yes, the reasonable lay observer would have gained such an impression. Therefore the respondent erred in deviating from its disciplinary

procedure by appointing an outsider without giving the applicant the opportunity to choose from the list.

The finding of procedural fairness on the grounds of bias would have the effect that the disciplinary inquiry's findings and recommendation and the premier's decision would all be null and void. This would mean that the arbitrator would be at large to decide the entire matter, including the imposition of a sanction. However, it is questionable whether the chairperson was at all biased, bearing in mind the test which the commissioner has correctly articulated, to the extent that the arbitrator inferred the inception of bias based upon the breach of the code, that perception must be based on the correct facts. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) at 177.

The facts in this matter are that there was no duty upon the premier's office to consult with Mr Malgas, although it may have been desirable, and accordingly there was no breach of the code. The arbitrator's inference that there was a perception of biased based on the nature of the charges and the relationship between all the persons involved is not sustainable. First there was no evidence that Ms Sadic had

herself been involved in the appointment of the chairperson. Secondly, this line of reasoning attacks the integrity of the chairperson on the basis of his mere appointment. It has nothing to do with what he did during the inquiry or before the inquiry of how he decided the matter. Thirdly, the constitutional court has rejected a similar attack on the impartiality of its judges where it was contended that they could not sit in the matter where they had been appointed in their case by the president of the country. The arbitrator's finding that there was a reasonable perception of bias, given the racial classification of the various persons involved is so grossly erroneous that it amounts to a gross irregularity.

In *S v Collier* 1995 2 SACR 648 (C) Hlope J ,as he then was, held:

"The mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating from a matter involving a non white accused. The converse is equally true, otherwise no black magistrate or judge could ever administer justice fairly and even-handedly in a matter involving a white accused. For the reasons set out above the argument that the white magistrate erred in refusing to recuse himself upon when asked to do so at the appellant's trial is both unfortunate

and untenable. The fact that he is a white person does not disqualify him from presiding in a case involving an accused belonging to a different race."

This quotation is equally applicable to the situation involving the disciplinary inquiry of Mr Malgas.

The arbitrator's finding constitutes a gross irregularity and it is so grossly unreasonable that it shows that the arbitrator failed to appreciate the nature of the test of bias and the public policy considerations involved. It may also be that she did not apply her mind to the facts of the matter, particularly when it comes to determining whether the chairperson himself gave rise to a perception of bias.

The arbitrator did not consider the other ground upon which Mr Malgas relied to prove a procedural unfairness. There is no cross review and I find it unnecessary to consider it. In any event the suspension of Mr Malgas does not impact upon the fairness of the disciplinary inquiry. It did create an inhibition on the ability of Mr Malgas or his attorneys to consult with the persons called as witnesses by the premier's office, but this does not constitute a procedural defect.

The result is that the procedural fairness of the disciplinary inquiry was fair. In view of this the arbitrator was

not entitled to interfere with the sanction unless it was such to induce a sense of shock. The arbitrator concluded with regards to the sanction that one must have regard to the guidelines that appear in the code of good practice of the Labour Relations Act 66 of 1995 as amended. According to these guidelines disciplinary measures should be corrective and progressive rather than punitive (item 3.2 of schedule 8 of Act 66 of 1995 as amended). It further states that if it should be made to correct the employee's behaviour through a system of graduated disciplinary measures such as counselling and warnings, item 3.2 states that it is not generally appropriate to dismiss an employee for a first offence except if the misconduct is serious and of such gravity that it makes the continued employment relationship intolerable. This reason contains a fundamental error of reasoning when applied to the final award which was made by the arbitrator. It amounts to a failure of the arbitrator to properly apply her mind to the facts and to the considerations in the code.

The arbitrator's principle reason for finding that the dismissal was inappropriate and that reinstatement would not be a suitable sanction was ... (inaudible) based on the fact that the continued employment relationship was not made

intolerable by reason of the misconduct. However, in granting compensation the arbitrator accepted that reinstatement or reemployment was intolerable and therefore ordered compensation to Mr Malgas. This error entitles me to decide the matter afresh, having regard to the sanction imposed by the disciplinary inquiry.

A reading of the facts and circumstances set out in the chairperson's decision shows that dismissal was entirely appropriate in the circumstances of this case. It was a gross case of involving an assault by a junior official on a senior official in front of other persons and none of the mitigating circumstances which were advanced by Mr Malgas are of sufficient weight to cause this to be inappropriate. The sanction is appropriate and there is no reason to interfere.

In the premises the award of the first respondent under case number PSGA151 of 16 November 2000 is reviewed and set aside and replaced with the finding that the dismissal of the applicant (Mr Malgas) was substantively and procedurally fair. The second respondent is ordered to pay the costs to the application in terms of section 158(1)(C) of the Labour Relations Act of 1995, is dismissed with costs.

LANDMAN J:

ON BEHALF OF APPLICANT:

ON BEHALF OF RESPONDENT: