REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, HELD IN CAPE TOWN

JUDGMENT

Case no: CA 08/08

In the matter between:

THE INDEPENDENT MUNICIPAL AND

ALLIED TRADE UNION obo ANTON STRYDOM **Appellant**

(Applicant in court *a quo*)

and

WITZENBURG MUNICIPALITY **First Respondent**

THE SOUTH AFRICAN LOCAL

GOVERNMENT BARGAINING COUNCIL **Second Respondent**

PIET VAN STADEN N.O. **Third Respondent**

Delivered: 13 February 2012

CORAM: WAGLAY, DJP; ZONDI, AJA *et* MOLEMELA, AJA

JUDGMENT

MOLEMELA AJA

Introduction

[1] This is an appeal against the judgment of the Labour Court in which it dismissed an application to review and set aside an arbitration award issued by the third respondent ("the commissioner") under the auspices of the second respondent. The appeal arises from the dismissal of a Mr Strydom ("the employee"), a member of the appellant trade union, by the first respondent ("the employer") pursuant to an enquiry into the employee's incapacity on the grounds of illness. The incapacity enquiry having culminated in the employee's dismissal, the commissioner subsequently found that the employee's dismissal was procedurally and substantively fair. The court *a quo* dismissed an application to review the award. The appellant approaches this Court with leave of the court *a quo*. There is no opposition to the appeal.

Application for condonation

[2] At the commencement of the proceedings this court had to determine an application brought by the appellant for condonation of its non-compliance with the rules pertaining to the filing of the appeal record, the notice of appeal, as well as the power of attorney. This Court, being satisfied with service of the application on the first respondent, was of the view that the appellant had made a proper case for the granting of condonation and accordingly granted the order and re-instated the appeal.

Background

[3] The employee previously held the position of "Town Clerk" until

December 2000. After a merger of several municipalities to form the first respondent, the employee occupied the position of Senior Administration Officer while acting as its Municipal Manager. Between May 2004 and January 2005, he was absent from the workplace due to illness for about eight months, during which period he was booked off-sick on the grounds of a mental condition, viz 'major depression disorder with symptoms of post traumatic stress disorder'. Throughout this period of absence, the employer did not initiate any enquiry into the employee's absence on account of ill-health. During January 2005 the employee applied for ill-health retirement benefits, a procedure commonly referred to as "medical boarding", from his pension scheme, which was underwritten by Metropolitan Insurance Company ("Metropolitan"). Although the employer was aware of the employee's application for medical boarding, it took no steps whatsoever for a further four months. It was only after the employer received Metropolitan's notification of its repudiation of the employee's claim that the employer directed two letters to the employee. The first letter enquired as to the employee's intended date of resumption of duties in light of Metropolitan's attitude to his claim. Curiously, on the same day, the employer directed another letter to the employee notifying him about an enquiry that was to be held into his incapacity. The enquiry was subsequently held during July 2005. The enquiry found that the employee was incapacitated from performing his functions with the employer on a permanent basis. The employee referred an unfair dismissal dispute to the second respondent and, in his referral for arbitration, alleged that the incapacity enquiry was incomplete as he had indicated that he wanted to obtain a report from another psychiatrist but was not permitted to do so. The relief sought by the employee was that of re-instatement, alternatively compensation. The commissioner found that the dismissal was procedurally and substantively fair. The employee unsuccessfully launched an application for a review of the award and now approaches this court on appeal.

Issues in the appeal

[4] The essence of the appellant's appeal is (1) whether the employer failed to give any effect to its obligations as enunciated in item 10 and 11 of Schedule 8 to the Labour Relations Act 66 of 1995 (the "LRA"); (2) whether the afore-mentioned non-compliance with the schedule resulted in the employee being dismissed unfairly; (3) whether the commissioner's finding that the dismissal was fair, was reasonable considering the employer's patent disregard of the aforementioned Schedule; (4) whether the court *a quo* erred in not setting the award aside and in the process made fundamentally erroneous findings of fact.

The relevant provisions of the LRA

[5] It is apt to refer to section 188(2) of the LRA. It provides that:

> 'any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure **must take into account any relevant code of good practice** issued in terms of this Act'. (my emphasis).

Schedule 8 to the LRA embodies the code in relation to dismissal. Items 10 and 11 thereof provide as follows:

> **'10: Incapacity: Ill-health or injury**
>
> (1) Incapacity on the grounds of ill-health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the

ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

(2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

(3) The degree of incapacity is relevant to the fairness of the dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps to consider.

(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate incapacity of the employee is more onerous in these circumstances.

11 Guidelines in cases of dismissal arising from ill-health or injury.

Any person determining whether a dismissal arising from ill-health is unfair should consider-

(a) whether or not the employee is capable of performing the work; and

(b) if the employee is not capable-

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work.'

[6] It is trite that the code of good practice is binding on commissioners. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] ("The *Sidumo* case"). My reading of item 10 and 11 gives me the impression that an incapacity enquiry is mainly aimed at assessing whether the employee is capable of performing his or her duties, be it in the position he or she occupied before the enquiry or in any suitable alternative position. I am of the view that the conclusion as to the employee's capability or otherwise can only be reached once a proper assessment of the employee's condition has been made. Importantly, if the assessment reveals that the employee is permanently incapacitated, the enquiry does not end there, the employer must then establish whether it cannot adapt the employee's work circumstances so as to accommodate the incapacity, or adapt the employee's duties, or provide him with alternative work if same is available.

[7] I must mention that I have no doubt in my mind that permanent incapacity arising from ill-health or injury is recognised as a legitimate reason for terminating an employment relationship and thus an employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances or duties cannot be adapted. A dismissal would, under such circumstances be fair, provided that it was predicated on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal.

[8] The afore-mentioned obligations of the employer as set out in items 10 and 11 of Schedule 8 to the LRA are inter-related with similar obligations in the Employment Equity Act 55 of 1998. In their work *Employment Equity Law* 2001: **7-3 to 7.4**, J L Pretorius *et al* submit that the duty of reasonable accommodation of employees by employers is not confined to the Employment Equity Act but 'is a duty

1 [2007] 12 BLLR 1097(CC) at paras 175 and 269.

that is implied in the concept of unfair discrimination in a general sense'and …'is one of the judicial and legislative tools for realising substantive equality'. I agree with this submission. Surely non-compliance with such an important constitutional imperative would not only impact on procedural fairness but on the substantive fairness of the dismissal as well?

[9] I am of the view that the provisions of item 10 and 11 are inextricably tied and thus non-compliance therewith would render a dismissal both procedurally and substantively unfair. This view is strengthened by the following remarks made by the former Labour Appeal Court in *National Union of Mineworkers and Another v Libanon Gold Mining Co Ltd,*[2] where the court interpreted the relevant provision of the previous Labour Relations Act as follows**:**

> 'In my view it would not be fair to dismiss an employee without first exhausting the possible alternatives. …What is in issue is the respondent's act of terminating the appellant's employment. Observance of a fair process is in my view fundamental to the question whether its decision to do so was fair. In my view, the fairness or otherwise of the decision cannot be divorced from the process by which it was arrived at.'

[10] In the case of *Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council and Others,*[3] **(**the court, dealing with a dismissal based on incapacity albeit not one related to illness, stated as follows:

> 'Manifestly, the question as to whether a dismissal in the circumstances of the present dispute is substantively fair depends upon the facts of the case. An employer needs to consider the reasons for the incapacity, the extent of the incapacity, whether it is permanent or temporary, and whether any alternatives to dismissal do exist'.

2 (1994) 15 ILJ 585 (Lac) At 589 F-J.
3 2010) 31 ILJ 1838 (LAC) at para 11,

The approach followed by the chairperson of the incapacity enquiry

[11] The incapacity enquiry was held on the 25th July 2005, approximately six months after the employee had unsuccessfully applied for early retirement benefits. At the enquiry, the employer relied on the medical report filed by a dr van Niekerk (a psychiatrist) which was attached as a supporting document to the employee's application for early retirement benefits. The employer also relied on the assessment report submitted by Metropolitan in support of its decision repudiating the employee's application. As stated before, at the time of the enquiry, dr van Niekerk's report was six months old. The latter report *inter alia* stated as follows:

> 'Whilst we do not dispute that the claimant is currently precluded from returning to his own occupation with the current employer, it is our opinion that it would be premature to establish the permanence of ongoing incapacity at this early stage. Since the claimant's symptoms reportedly stabilise when removed from the specific stressor of his own workplace, it is accepted that with ongoing psychotherapy and special management, the claimant is deemed capable of resuming his own occupation or reasonable alternative duties within the open labour market in the future'.

[12] Having considered both dr van Niekerk's medical report and the Metropolitan's evaluation report, the chairperson of the enquiry concluded that the employee's continued employment with the employer would be contrary to medical opinion and would not be viable. It is not clear from the enquiry's outcome report as to why the chairperson found that 'insufficient argument had presented for me to conclude that the condition of the employee is directly linked to his work circumstances (sic) when the undisputed medical evidence as embodied in dr van Niekerk's report actually stated that the employee's condition was indeed caused by work-related stress. Furthermore, he chose to finalise the enquiry on the basis of a medical report that was issued six months prior to the enquiry, despite the employee having

indicated that he intended seeking a second opinion from another psychiatrist. Clearly, reliance on an out of date report compromises the making of a proper assessment of the extent of an employee's incapacity.

[13] Furthermore, the chairperson of the enquiry seems to have used the enquiry for other purposes which had nothing to do with establishing the extent of the employee's incapacity, thus fortifying the appellant's contention that the enquiry was not only about incapacity but also about misconduct. I would agree with this contention based on the following utterances made by the chairperson of the enquiry: Firstly, having correctly stated in the introductory part of the outcome report that his role was primarily to decide the degree of incapacity and to determine to what extent the employee could continue to perform his duty, he went on to state that the issue to be decided was '**not whether the employee is fit for duty or not but goes beyond that**. It would highly be inappropriate as chairperson to make such a recommendation since I am not a qualified medical practitioner who can make that kind of decision. Rather, I have the responsibility to consider **whether or not a continued employment relationship is going to be amenable** to both parties concerned.' Secondly, having recommended that the employee's services be terminated with immediate effect, the chairperson went on to state that '…it is advisable to reconvene the hearing specifically to allow Strydom **to present arguments in mitigation**'. Thirdly, the chairperson, referring to a previous occasion where the employee had lodged a claim for compensation arising from an alleged injury on duty, stated that it needed to be recorded that the employee had '**fraudulently applied** and submitted a report to the Department of Labour.' (my emphasis).

The arbitration

[14] The arbitration was held from 15th to 26th of June 2006. Documentary evidence was handed up and each party called one witness. It is

settled law that an arbitration hearing is a hearing *de novo*. In the case of *County Fair Foods (Pty) Ltd v CCMA and Others*[4] it was stated as follows: 'However, the decision of the commissioner as to the fairness or unfairness of the employer's decision is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the commissioner. To that extent, the arbitration proceedings are a hearing *de novo*'.

This principle was recently re-affirmed by the Constitutional Court in the case of the *Sidumo* case supra at para 18 and also at para 59 where the following was stated:

> '…This determination [whether a disputed dismissal was fair] and the assessment of fairness is not limited to what occurred in the disciplinary hearing.'

[15] On the understanding of what an arbitration hearing entails, one would have expected that the commissioner would listen to evidence afresh and then make a determination as to the fairness or otherwise of the employee's dismissal. Instead of doing so, the commissioner sought to confine himself only to the evidence that was available as at the time of the enquiry notwithstanding the fact that new evidence was adduced before him, both documentary and oral. The latter approach was wrong as it equated an arbitration hearing with an appeal hearing of some sort, quite far removed from the principle enunciated in the afore-mentioned cases.

[16] The commissioner's summary of Mr du Plessis' evidence confirms that it was not disputed that the employee suffered from the illness diagnosed by dr van Niekerk, which, according to the same doctor, was work-related. The same summary of evidence also revealed that dr van Niekerk had noted that the employee's condition was not permanent and had contended that the employee could be ready for duty by 2007.

4 (1999) 20 ILJ 1701 (LAC) at para 11.

[17] The commissioner's summary of evidence as it appears on p42 of the record reveals that dr Kalinski's report was handed in at the arbitration hearing. This report *inter alia* stated that the employee was capable of fulfilling the demands of his job and he ought to be encouraged to return to work. That same report also stated that the employee's diagnosis had always been of such a nature that he should never have been regarded as permanently impaired. The commissioner focused on an earlier report that stated that the employee would possibly be ready to resume his duties in 2007, totally ignoring dr Kalinski's report that showed that at the time of the arbitration hearing, he had already recovered from his illness. Despite this evidence being before the commissioner, he ignored dr Kalinski's entire report except the part stating that the employee could not bear to be at work. Surprisingly, on the same page on which this remark was stated, the report also stated that the employee 'did not appear to be clinically depressed and no psychotic symptoms were evident', which evidence was not taken into account by the commissioner. I must however add that the employee failed to file the final page of Dr Kalinski's report. Whether this played a role in the arbitrator' failure to consider the report as whole is not evident.

[18] The commissioner furthermore found that the employee did not "want" to accept an alternative position Du Plessis confirmed that there were many other clerical positions available but none were offered to the employee as it was assumed that he would not accept a lower position. The commissioner in my view correctly ignored the evidence of the employee's legal representative, that the employee had an interest in doing alternative work as the employee was available to tender such evidence himself. For its part, the employer did not present any medical evidence either disputing the employee's illness or his fitness to return to work or to do alternative work. This, notwithstanding the fact that the *onus* to prove the fairness of the dismissal rested on it, that is the employer.

[19] The commissioner also seems to have been unsure as to how to deal with the evidence that was put before him. Having canvassed all the evidence in his summation of the evidence adduced at the arbitration, including the medical report issued by another psychiatrist, viz dr Kalinsky, he went on to state that he could not consider dr Kalinski's report as it was issued after the enquiry. This confusion is aptly demonstrated by the following passage from the award: 'It is trite that an arbitrator must decide a case on the evidence before him and not what was before the chairperson. As has been mentioned, Drs van Niekerk and Kalinsky's reports could not have served before the chairperson. In my view, for the reasons alluded to above, I am unable to find that there is any basis for me to interfere with the finding and sanction of Respondent.'

[20] It is clear from the award that the commissioner admitted documentary and oral evidence pertaining to dr Kalinski's report, but then made a finding that he could not consider the reports that did not serve before the chairperson of the enquiry. Having made such a finding, he then still proceeded to relying on certain parts of dr Kalinski's report, albeit selectively. Unfortunately the medical report to the effect that the employee had recovered from his illness and his representative's evidence that the employee was willing to accept alternative employment was not taken into account by the commissioner and he instead relied on dr van Niekerk's initial report, which indicated that the employee would resume duties only in 2007. It was on this basis that the commissioner went on to conclude that the employee had no desire to return to work. This conclusion, in my view was based on a wrong premise.

[21] Whereas at the enquiry, the chairperson's interpretation of Metropolitan's assessment report was that the employee was incapable of resuming his employment with the employer, by the time of the arbitration, the assessment had been clarified as follows:

> 'It was our opinion however that the claimant's condition, at the time of

> the assessment, **could not be totally, permanently and continuously disabling in terms of performing his own or a reasonable alternative occupation.**' (my emphasis).

This clarification, too, was before the commissioner and it was also referred to in the pre-arbitration minutes, but was not taken into account.

[22] This conduct on the part of the commissioner flies in the face of the well-established principle of our law, stated as follows at para 268 of the *Sidumo* case (*supra*):

> 'It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because it is wrong, but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

The finding of the court *a quo* vis-á-vis the review test

[23] In the *Sidumo* case (*supra*) the review test was enunciated as follows in par 110:

> 'To summarize, Carephone held that s145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one which a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices but also to

> the right to administrative action which is lawful, reasonable and procedurally fair.'

[24] In the case of *Fidelity Cash Management Services v CCMA and Others,*[5] the court elaborated on the afore-mentioned test as follows:

> 'The court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal was fair or not but whether or not the commissioner's decision, one way or another, is one which a reasonable decision-maker could not reach in all of the circumstances.'

[25] I have, in the afore-going paragraphs demonstrated how the commissioner failed to consider certain evidence that was put before him. If an arbitration hearing is a hearing *de novo*, then there is no valid reason why the additional evidence that was presented at the arbitration hearing was not considered. Failure to consider all the relevant evidence clearly resulted in the employer failing to do a proper assessment of the employee's capability to continue working, as contemplated in item 10 and 11 of Schedule 8. When consideration is paid to all the above circumstances, it stands to reason that the decision of the commissioner was one that a reasonable decision maker could not reach and thus fell to be set aside on review.

[26] The court *a quo,* however, dismissed the application for review, having stated that the question that needed to be answered was: 'Can an employee insist on being employed in the same workplace that he alleges has induced his depression?' The court *a quo* then went on to remark as follows:

> 'Typically of all employees who do not succeed with their application for medical boarding, this employee, too was in a Catch-22 situation. He had to assert that he was permanently unfit for work in order to succeed in his application. When he failed in that application, he had

5 (2008) 3 BLLR 197 (LAC) at par 98 – 99.

> to assert that he could perform some work in order to resist an incapacity dismissal successfully."'

[27] In my view, the question posed and the aforementioned remarks made by the court *a quo* were misplaced as they did not take the following facts into account: firstly, none of the medical reports that were submitted claimed that the employee was permanently disabled or incapacitated. Secondly, there was a substantial lapse of time (a period of six months) between the application for medical boarding and the incapacity enquiry, such that by the time the arbitration hearing was held, the employee had, according to dr Kalinski recovered from his mental condition and could resume duties. Under such circumstances, there was no basis for finding that the employee was permanently incapacitated or that he could not reasonably be accommodated by the employer.

[28] In addition to the above, it is patently clear from the award that the commissioner did not pay due regard to items 10 and 11 of Schedule 8 and thus failed to comply with section 188(2) of the LRA, which non-compliance has already been alluded to in the preceding paragraphs. This is another reason why the award fell to be set aside, which the court *a quo* did not do.

[29] I am satisfied that the decision of the commissioner was not one that a reasonable decision-maker could have reached under the circumstances and ought to have been set aside by the court *a quo* and substituted with an order that the dismissal of the employee was both substantively and procedurally unfair. The court *a quo* therefore erred in coming to the opposite conclusion. In view of this finding, which is dispositive of the matter, I do not deem it necessary to address myself to the aspect pertaining to the errors made by the court *a quo* in its summation of the evidence adduced at the arbitration hearing, which allegedly led it to make fundamental errors of fact.

[30] I have noted that the relief sought by the employee was that of re-instatement, alternatively compensation. It is trite that the primary remedy is that of re-instatement, except where same is inappropriate, in which event compensation should be ordered.

[31] When deciding on the appropriate relief, I am entitled to take into account the commissioner's finding that the employee did not want to work for the Respondent. This was the evidence led by the employer and not rebutted by the employee. In fact, as I have said earlier the employee, although available, refused to testify at the arbitration. I am also entitled to take into account the employee's conduct particularly after he was said to be fit to resume his duties in determining an appropriate relief.

[32] Despite the earlier report that the employee was not permanently disabled, nothing was said as to what, if anything, did the employee do to demonstrate an interest to return to work.

[33] Also, although the medical report produced at the arbitration claimed he was fit to commence employment, no such tender was made, nor was the employer's evidence that he will not want to return to work challenged. The absence of the employee testifying and wanting to submit to cross-examination about his willingness to work particularly in light of the evidence to the contrary must call into question the appropriateness of granting reinstatement.

[34] Furthemore, the employee has not worked since 28 May 2004 and there is also no evidence that the stressors that caused his condition are in any way eliminated or lessened. In these circumstances I am satisfied that this is not a matter in which reinstatement is appropriate.

[35] I, however, believe that the employee should be compensated for being dismissed unfairly. With regard to costs I see no reason why

costs should not follow the result in the court *a quo*.

[36] In the result, I would grant the following order:

1. The application for condonation of the late filing of the appeal record, the notice of appeal, as well as the power of attorney is granted.

2. The appeal against the decision of the Labour Court is upheld.

3. The commissioner's award is hereby reviewed and set aside and replaced with the following order:

    3.1 'The dismissal of Anton Strydom was both procedurally and substantively unfair.

    3.2 The first respondent is ordered to pay compensation to Anton Strydom in an amount equivalent to 12 months remuneration at the rate that applied on the date of his dismissal.

    3.3 The first respondent is further ordered to pay the costs of the suit.'

4. No order is made as to costs in respect of the appeal.

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MOLEMELA, AJA

I agree.

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WAGLAY DJP

I agree.

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ZONDI AJA

APPEARANCES:

For the appellant: Mr. Niehaus of Minaar Niehaus Attorneys