IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA118/13

In the matter between:

WINNIE MAHLAKOANE **Appellant**

and

SOUTH AFRICAN REVENUE SERVICE **Respondent**

Delivered: 25 January 2018

Summary: Review of arbitration award – employee dismissed for fraudulently receive social grant for her two children – first disciplinary hearing clearing employee of any wrongdoing as she produced letters evincing that she requested the payment of the grant to be stopped – employer subjecting employee to a second disciplinary hearing when evidence surfaces that the letters produced at the first hearing were forged – court finding that the second charges leading to the dismissal levelled against employee differ from the first charges – court holding that the concept of double jeopardy relied on by the commissioner had no application- consequently, employee found to have forged the letters. Labour Court's judgment upheld and appeal dismissed with costs.

Coram: **Tlaletsi DJP, Ndlovu *et* Coppin JJA**

JUDGMENT

COPPIN JA

[1] This is an appeal against an order of the Labour Court (Cele J) in terms of which an arbitration award made in favour of the appellant by a commissioner of the Commission for Conciliation Mediation and Arbitration (CCMA), to the effect that the dismissal of the appellant by the respondent was substantially unfair and reinstating her, was, at the instance of the respondent, reviewed and set aside in terms of section 145 of the Labour Relations Act[1] (LRA). Leave to appeal to this Court was granted by the Labour Court.

Factual background

[2] In the year 2000, the appellant was living with her husband, Mr Setshedi, and two minor children and was unemployed. As a consequence, she applied for and was granted a child support grant for the two children in terms of the Social Assistance Act, which was repealed and replaced with a new Act[2] (the SAS Acts).

[3] On 1 February 2006, the appellant was employed by the respondent. As a result, her entitlement to the support grants ceased in terms of the SAS Acts. Notwithstanding the appellant continued to draw the grants in breach of that Act.

[4] When the matter came to the knowledge of the respondent in 2008, the appellant was charged with fraud, alternatively with breaching the respondent's Disciplinary Code, in that she continued to draw child support grants despite her employment and in breach of the SAS Acts.

[5] At the disciplinary hearing in 2008, (the first disciplinary hearing) the appellant's defence, in essence, was that she had informed the South African Social Security Agency (SASSA), which is responsible for distributing the grants, that she no longer qualified for the grants, but nothing came of it. In substantiation of her defence, she produced two letters purporting to be from SASSA and dated 2 October 2006 (one in respect of each child) and in terms of which SASSA informed the appellant that the grants had ceased because

[1] Labour Relations Act 66 of 1995.
[2] The Social Assistance Act 59 of 1992 was repealed by and replaced with the Social Assistance Act 13 of 2004.

of her changed financial circumstances and that she was no longer entitled to the grants in terms of the social assistance legislation.

[6] As a result, the Chairperson of the first disciplinary hearing did not find the appellant guilty of fraud, but only of continuing to receive the grants despite not qualifying therefor, which constituted an offence in terms of the respondent's Disciplinary Codes. As a sanction, the Chairperson recommended a final warning and this recommendation was accepted and applied by the respondent.

[7] In 2010, Mr Setshedi who had now become separated from the appellant, informed the respondent regarding the two SASSA letters, which the appellant relied upon in the first disciplinary hearing, that the dates on those letters were forged and that he had assisted the appellant with the forgery. As a consequence, the respondent charged the appellant with at least five counts of misconduct involving fraud, forgery and uttering, alleging essentially that she had forged the dates on the SASSA letters and had presented them as having emanated from SASSA in 2006, well-knowing that that was not the case (the second disciplinary hearing).

[8] In the second disciplinary hearing the appellant was found to have committed the misconduct as charged and the sanction of dismissal was imposed on her about 15 September 2010.

[9] Aggrieved by this outcome, the appellant referred an unfair dismissal dispute to the CCMA for conciliation, failing which, arbitration. At the end of the arbitration proceedings, the Commissioner issued an award in which he found that the appellant had been unfairly dismissed an ordered the respondent to reinstate her.

[10] The respondent did not accept the award and brought an application in the Labour Court in terms of section 145 of the RLA to review and set it aside.

[11] In coming to make the award in favour of the appellant, the Commissioner had found, in essence, that it was unfair for the employer to have subjected the appellant to a second disciplinary hearing as this constituted double

jeopardy because, according to the Commissioner: the allegations raised by the respondent at the arbitration were the same as the allegations raised against her at the disciplinary hearing resulting in her dismissal; secondly, because the respondent's Disciplinary Code made no provision for such a second disciplinary hearing; thirdly, because the first disciplinary hearing, according to the Commissioner, was a fully-fledged disciplinary hearing that gave the parties the opportunity to lead relevant evidence, including evidence about the authenticity of the two contested letters produced and that the final warning had been given to the appellant as a sanction as it was fair; fourthly, because the disciplinary hearing was presided over by a chairperson of standing, who came to "definitive decision that the two contested letters were genuine"; fifthly, because the appellant's evidence had been accepted by the Chairperson at the first disciplinary hearing as he was impressed with her as a witness; sixthly, because Mr Setshedi only spoke out after 18 months and after he had become hostile towards the appellant and was a self-confessed accomplice in the alleged falsification of the dates on the two letters; seventhly, because the evidence of the appellant and her witness, Ms N Mtshweni, to the effect that the letters were not falsified and that they had gone to the SASSA offices to report that the appellant no longer qualified for the grant and had obtained those letters from them, may be true.

[12] And, lastly, the Commissioner was further of the view that the respondent's special investigator, Mr J G Kidson and its special prosecutor, Ms C van der Spuy, were ignorant of what happened at SASSA and that the evidence of Ms Van der Spuy, that the appellant "would not have been charged criminally if she produced the two letters which she did not, is perhaps the strongest evidence" against the appellant's version that the letters were "authentic and not falsified".

[13] The Commissioner then proceeded to set aside the findings of the disciplinary hearing that resulted in the appellant's dismissal and reinstated her in a post at the respondent as Revenue Administrator, with full benefits. She was to report for duty on 15 June 2016, if not on a date agreed to by the parties. The Commissioner further ordered the respondent to pay the appellant back pay in

an amount of some R84 600,00 in respect of the period spanning from the date of her dismissal until about 15 June 2016.

[14] The respondent took this award on review to the Labour Court seeking that it be set aside and that the matter be remitted to the CCMA for a fresh hearing before a different Commissioner, alternatively that it be declared that the dismissal of the appellant was substantively fair.

Labour Court

[15] The Labour Court found that the Commissioner's finding of "*double jeopardy*" had "*no support on the facts or in law*" and that the two sets of misconduct, i.e. those that the appellant was charged with in the first disciplinary hearing and those she was charged with in the second hearing, "*were clearly distinguishable from each other*", despite some facts and role-players that they had in common; that the Commissioner had "*conflated the two acts of misconduct into one*"; that the respondent was accordingly found to have been (fairly) entitled to "*subject*" the appellant to a second disciplinary hearing "*to deal with the new and different accusations they just received from the Appellant's ex-husband*".

[16] The Labour Court found that the respondent could not have anticipated Mr Setshedi's allegations concerning the forgery of the two letters and from the respondent's perspective, the second disciplinary hearing was "*neither malicious not unfounded*", though Mr Setshedi's evidence had to be treated with caution, because its rationale was meant to do his estranged wife the "*most horrible harm*".

[17] In respect of the question whether the respondent's evidence in the second disciplinary hearing was sufficient for the appellant to be found guilty of the misconduct alleged, the Labour Court concluded, having discussed the evidence briefly, that it was apparent that it was more than probable that the letters from SASSA were dated 2007 and this was apparent from a careful scrutiny of those letters and because the grants were not stopped in 2006 but only in October 2007 which is consistent with Mr Setshedi's version.

[18] The Labour Court held that the Commissioner's finding that the two letters could not have emanated from SASSA was inconsistent with its other findings. Further, that the Commissioner's reasoning was at odds with the respondent's evidence: The Commissioner's finding, for example, that the evidence of the appellant and the witness Ms Mtshweni had a number of discrepancies, but that Ms Van der Spuy presented stronger evidence than the appellant in respect of the two letters, did not justify the Commissioner's conclusion in favour of the appellant. According to the Labour Court, the Commissioner's conclusion in those circumstances "is a clear manifestation of his failure to apply his mind appropriately to the proven facts"'. The Labour Court held that this amounted to a gross irregularity and that the Commissioner ought to have found that the misconduct of the appellant "*was proved on the accepted evidence*". The misconduct was also of a very serious nature involving "*forgery, uttering and dishonesty*" and brought the respondent's name into disrepute.

[19] In the result, the Labour Court reviewed and set aside the award of the Commissioner and found that the appellant's dismissal was substantively fair. No costs order was made.

On appeal to this court

[20] In this Court the appellant, in essence, defended the findings of the Commissioner. Her contentions through counsel, in brief, were the following. Because the Chairperson in the first disciplinary hearing accepted the two letters as "*genuine*" and "*not fraudulent*", and because he was impressed with the appellant and her witness the "*element of fraud was eliminated*". It was submitted the respondent failed to prove that the two letters were fraudulently obtained and that the Labour Court erred in finding that it was more than probable that the original letters were obtained in 2007, because the grants were only stopped in 2007, and because SASSA did not have the original letters. In dealing with the discrepancies in the letters, it was submitted that nothing was mentioned by the whistleblower, Mr Setshedi, about the date which had allegedly been altered.

[21] In substantiation, the appellant's counsel submitted, in essence, that the second disciplinary hearing constituted "*double jeopardy*", because the charges in that hearing "*emanated from an issue that was ventilated or ought to have been raised which was not and then ventilated in the first hearing*". Further, that the second hearing was "*tantamount to an appeal of some sort to the first hearing if not malicious*"; that the Chairperson in the first disciplinary hearing had "*a duty to challenge and verify*" the authenticity of the letters "*but elected not to do so*". Further, that the Chairperson's conduct rendered the issue, concerning the authenticity of the letters, "*res judicata*".

[22] Counsel for the appellant further submitted that it was not fair for the second disciplinary hearing to be "*opened against*" the appellant. It was further submitted that the credibility of Mr Setshedi was not questioned and that, instead, his evidence was accepted without question. Further, that Mr Setshedi was not required to produce the original letters to support his allegations, or the e-mails that were allegedly sent to him in which he was commended for a job well done in forging the letters. Counsel for the appellant also questioned the fact that the respondent was not required to produce proof of its allegations, despite Mr Setshedi's hostility towards his wife. Counsel proceeded to criticise Ms Van der Spuy's evidence, contending that it was misleading and further submitted that "*the dismissal of the appellant remained unfair and therefore unlawful because she was dismissed for a charge not proven on a balance of probabilities; that the holding of the second disciplinary inquiry constituted double jeopardy and was encouraged by malice"*. The appellant's counsel submitted in conclusion that the appeal ought to be upheld, that the order of the Labour Court set aside and that the ruling of the Commissioner be "*reinstated*".

[23] On the other hand, the respondent's counsel argued in support of the reasoning, findings and conclusions of the Labour Court and asked that the appeal be dismissed with costs.

Consideration

[24] The test on review is not whether the Commissioner was right or wrong, but whether, as laid down by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd and Another (Sidumo*)[3] and by this Court in *Gold fields Mining SA (Pty) Ltd v CCMA and Others,*[4] the decision made by the Commissioner is one that a reasonable decision-maker could not have made. It is also a trite principle, subsequently restated by this Court and other courts, that if the Commissioner misconstrues the nature of the inquiry and that has an impact on the outcome of the arbitration, it would constitute a reviewable irregularity.

[25] As I will discuss in more detail, the finding of the Labour Court, in effect, that the Commissioner did not reach a decision which a reasonable decision-maker, in light of all the facts and circumstances could have reached, is unassailable. The Labour Court's resultant finding, that the dismissal of the appellant in those circumstances was substantially fair, is also in my view uncontestably correct.

[26] In elaboration, I shall deal in turn, with what are, essentially, the two principal issues in this appeal. The first pertains to the alleged "*double jeopardy*" issue and the second to whether the charges of misconduct in the second disciplinary hearing had been proved. A related question is whether the dismissal of the appellant was substantively fair.

'*Double jeopardy*'

[27] The principle of "double jeopardy" has, as its heart, fairness and this rule or principle simply entails that an employee cannot, generally, be charged again with the same misconduct that he or she was either found guilty or not guilty of. However, there are instances where breaches of this rule or principle can

[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Another* [2007] 12 BLLR 1097 (CC) para [110].
[4] *Gold Fields Mining SA (Pty) Ltd v CCMA and Others* [2014] 1 BLLR 20 LAC esp. para [14].

be condoned. The paramount consideration, however, is fairness to both sides.[5]

[28] It is apparent that the charges of misconduct in the first disciplinary hearing in 2008 and those in the second hearing are not the same, so the double jeopardy principle does not arise for consideration. In the first disciplinary hearing, the appellant was charged with fraud, alternatively with a contravention of section 12(2) read with section 17 of the SAS Act, alternatively, with contravening clause 6.1 of the respondent's Codes of Conduct. The main allegations in that disciplinary hearing being that the appellant, well-knowing that she did not qualify for the child support grants in respect of her two children and in terms of the SAS Acts continued to take those grants. In the alternative, it was alleged that she received the grants knowing that she was not entitled to do so. It was also alleged that she failed to inform SASSA of her changed financial circumstances after she became employed by the respondent and as she was required to do by law.

[29] The record of that inquiry shows that the appellant pleaded guilty to the main charge of fraud, but was ultimately found not guilty of that charge on the basis that the evidence did not support that charge. According to the Chairperson in that inquiry, on the evidence "*Ms Mahlakoane made no representation causing a loss or a potential loss to the Department of Social Development*". The appellant was however found guilty of the first alternative charge as she continued to receive the grants well-knowing that she was not entitled to them and because this constituted an offence, and accordingly, a contravention of the respondent's Disciplinary Code. The appellant was given a final written warning valid for one year on 5 September 2008.

[30] Those charges did not relate at all to the authenticity of the letters or the genuineness on the dates of those letters. Those issues were not part of the charges in the first inquiry and the letters were merely submitted by the appellant in that inquiry in substantiation of her defence that she had reported

[5] See *inter alia BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC); *Branford v Metro Rail Services (Durban) and Others* (2003) 24 ILJ 2269 (LAC) and the helpful and insightful discussion of the topic in J Grogan "*Workplace Law*" (2007) pp 200-204.

her changed financial circumstances to SASSA in 2006, but they nevertheless continued to pay the grants despite such notification.

[31] The charges in the second disciplinary hearing emanate from information supplied to the respondent by Mr Setshedi, her estranged husband, that the dates on the letters which the appellant had relied on, had been altered with his assistance. According to him, the date on the original letters from SASSA was 2 October 2007, but they had altered the year to 2006. Part of their *modus operandi* to make the date of 2006 appear authentic, was to rely on copies of the altered original letters and to have those copies certified as true copies of the original letters. The true original letters were discarded, and the appellant produced copies of the falsified letters at the first hearing. According to Mr Setshedi, even the certificates proclaiming the authenticity of those altered copies was also false. They purported to be certifications by a police officer, but the name of the police officer appearing on those certificates was made-up; such a police officer does not exist and the police have never seen the copies. According to Mr Setshedi, he obtained and applied the SAPS stamp himself. He also completed those portions requiring completion himself and had signed as if they had been signed by a member of the police services.

[32] The charges in the second disciplinary hearing, therefore, centred on the falsification of the dates on the letters. It was never an issue or in contention before and never required resolution or investigation before. Charge 1 relates to the letter in respect of the one child. It is alleged in essence that the appellant created a false letter with the intent to defraud the respondent by altering the date and the contact details on the document. It is further alleged that this altered document purports to have been issued by SASSA on 2 October 2006, whereas SASSA in truth and in fact issued the letter on 2 October 2007. This is a forgery count.

[33] Count 2 is an uttering count. The gist of it being that the appellant, with the intent to defraud the respondent, "*passed off this falsified letter in the first disciplinary hearing to the prejudice of the respondent*". Counts 3 and 4 are the same as 1 and 2 but relates to the second child.

[34] Count 5 is a charge of fraud wherein it is alleged that the appellant, at the first disciplinary hearing, with the intent to defraud SARS or Adv Hiemstra SC, who presided at that hearing, misrepresented that she had made several attempts to cancel the SASSA grants; had approached SASSA on 2 October 2006 informing it of her changed financial position and requesting it to cancel the grants and that the two letters were true and correct and obtained on 2 October 2006, whereas she had made no attempt to cancel the grants; did not approach SASSA on 2 October 2006 on the matter; did not obtain the letters form SASSA on 2 October 2006; and that the letters were only obtained in 2007 and, furthermore, that the appellant had thereby induced the respondent, or the Chairperson (Mr Hiemstra), to believe that she was not guilty of the charges or that she should receive a more lenient sanction. There was also an alternative to count 5. This alternative related to dishonesty, although it is almost worded exactly as count 5, but for reference to a different provision under the respondent's Disciplinary Code.

[35] The Commissioner's conclusion, in effect, that the charges of misconduct in the first and second disciplinary hearings were the same, and that the principle of double jeopardy found application, are material misdirections. The appellant was not charged in the first disciplinary hearing with falsifying letters, or with making false representations to the respondent, or to Mr Hiemstra. The misconduct charged in the first and second disciplinary hearings are apparently distinctly different. A reasonable commissioner would have appreciated the material differences in the two sets of charges and would not have reached the same conclusion as the Commissioner.

Were the charges proved?

[36] As despicable as Mr Setshedi's perceived act of disloyalty toward his estranged wife, the appellant, might seem, his version is supported and confirmed in all material respects by independent facts and circumstances and/or evidence.

[37] The appellant's version that she went to SASSA to report her status on more than one occasion and that SASSA gave her proof on her insistence of her

reporting, in the form of the two letters, is not borne out by the wording of the letters. After all, why would the SASSA letters be informing the grantee of the lapse of the grant and the reason for it, if the grantee is the one that informed them, in effect, to stop the grant? It is more probable that SASSA wrote the letters after becoming aware that the appellant no longer qualified for the grants and proceeded to stop them. The last paragraphs of the letters, that are also identical, confirms that it was a notification by SASSA to the appellant and not the other way round.

[38] A further observation is that the letters notify the grantee (i.e. in this case the appellant) that the grant has lapsed and not that it will lapse in the future. It is improbable that in a letter dated 2 October 2006 SASSA would notify the grantee that the grant has lapsed, but then the lapse is affected only a year later in October 2007. It is more probable that the grant stopped immediately after SASSA was informed of the appellant's change in income. The grant lapsed only in October 2007. It is more likely that the change was only then reported to SASSA.

[39] The appellant conceded that she received the social grants until October 2007. This is consistent with her cancellation request being made and processed during that month. The uncontested evidence was further that SASSA, which has not been accused at all, let alone by the appellant, of partisanship or of having a motive to falsely implicate the appellant in wrongdoing, had no record of letters issued to the appellant in 2006, but had on record letters issued to her on 2 October 2007.

[40] SASSA's records included a backup hard copy of those letters and an audit of the cancellation process that had been done in 2007, which confirmed that no cancellation request had been made in 2006. An Assistant Manager at SASSA, Ms Sorajbally, who had been called as a witness, produced the relevant SASSA file at the hearing and testified *inter alia* that they keep on file all letters that had been sent to grantees and the only letters sent or given to the appellant were the ones dated 2 October 2007. The grants, according to Ms Sorajbally, were cancelled on 2 October 2007. All of this, according to her, was confirmed by an audit.

[41] Ms Sorajbally further explained that a request for cancellation of the grants payable to the appellant, came, not from the appellant, but from the Special Investigation Unit (SIU) and that it was one of a whole number of such requests. She refuted the appellant's version that the appellant had requested cancellation in 2006 and explained the process that SASSA followed when a grantee or recipient requests a cancellation. When such a person requests cancellation, they are required to complete a form and they are issued with a receipt letter after they had cancelled the grant.

[42] In the case of the appellant, SASSA did not have on record that they issued either a receipt, or that the appellant had completed a form. That together with the fact that they had on record letters identical in content to the ones relied upon by the appellant in the first disciplinary hearing, but which were dated 2 October 2007, and were issued at the request of SIU, was further strong independent corroboration of the veracity of Mr Setshedi's version.

[43] On the probabilities, it is unlikely in the extreme for all of the following to occur coincidentally, namely for SASSA to have no record of the letters for 2006, and for it to have no receipt and no form, which are an integral part of the cancellation process. It is more probable that those documents were not in SASSA's file because no request for cancellation by the appellant occurred in 2006 or even in 2007 and that the cancellation had only been effected at the request of SIU in October 2007 when the letters were also issued.

[44] Effectively, Mr Setshedi's version that the police stamp on the falsified letters, was also a falsification, stood uncontested. On the appellant's own version, she had no knowledge how the stamp got to be placed on those letters. It was rather strangely put by her representative to Mr Kidson that the appellant only became aware that the police stamp on the letters was fraudulent after she heard her husband testified at the second disciplinary hearing.

[45] Another aspect that weighs heavily against the appellant's veracity and in effect supports the truth of Mr Setshedi's version is the uncontested evidence given by Ms Sorajbally that SASSA could not change the date of the letters on

the system because it was hard coded. As stated earlier SASSA would in any event have had no motive for changing the dates.

[46] One must also take into account that the appellant had a clear motive for changing the date. Unless she showed at the first disciplinary hearing that she had requested a cancellation, she faced the prospect of being found guilty of fraud and of being dismissed. Mr Setshedi confirmed the rationale for changing the date of the letters.

[47] The *onus* of proving the misconduct in the second inquiry, and then in the contested arbitration that followed that inquiry, was to be discharged by proof on a balance of probabilities. There is no doubt that the *onus* in this instance had been discharged by the respondent. The probabilities are overwhelmingly that the date on the letters that had been issued by SASSA on 2 October 2007 had been altered to 2 October 2006 and that the police stamp on the copies of those letters, are falsifications. The Commissioner's finding, in effect, that the charges were not proved is not a conclusion that a reasonable decision-maker would have come to.

[48] The misconduct was of a very serious nature and involved calculated acts of dishonesty perpetrated by the appellant and Mr Setshedi. In those circumstances, the sanction of dismissal was clearly justified. For all those reasons, the Labour Court's order is correct.

[49] The fact that the appellant nevertheless pursued this appeal given the circumstances, weighs heavily in favour of an order that the costs should follow the result. I find no reason in fact or law why that should not be so.

[49] In the result, the appeal is dismissed with costs.

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P Coppin JA

Tlaletsi DJP concurs in the judgment of Coppin JA.

After the judgment was reserved and before it could be finalised the allocated scribe, Ndlovu JA, sadly passed away. This resulted in the unfortunate delay, for which we apologise.

APPEARANCES:

FOR THE APPELLANT:	M Z Makoti
	Instructed by T T Hlapolosa Inc
FOR THE RESPONDENT:	Adv Riaz Itzkin
	Instructed by Edward Nathan Sonnenbergs