



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE**

**CASE NO. 1028/18**

In the matter between:

**VIP PROTECTION SERVICES (PTY) LIMITED**

**APPLICANT**

**And**

**MANDLA HLATSHWAYO**

**1<sup>st</sup> RESPONDENT**

**KHONTAPHI MANZINI N.O.**

**2<sup>nd</sup> RESPONDENT**

**CONCILIATION MEDIATION &**

**ARBITRATION COMMISSION**

**3<sup>rd</sup> RESPONDENT**

**Neutral Citation:** *VIP Protection Services (PTY) Limited vs Mandla*

*Hlatshwayo & 2 Others [1028/18] [2019] SZHC 106 (19*

*June 2019)*

**Coram:** **M. LANGWENYA J**

**Heard:** **9 November 2018**

**Delivered:** 19 June 2019

**Summary:** *Labour Law-Application for review of arbitrator's award- Section 85(4)(d) of the Industrial Relations Amendment Act 2010-Process of resolution of an industrial dispute goes along a statutory continuum-arbitrator cannot as a matter of law and common sense ignore record of proceedings of internal disciplinary hearing-Arbitration proceeding is separate and distinct from internal disciplinary process-Arbitrator will disregard findings of internal hearing unless there is failure to adhere to rules of natural justice and misapplication of the applicacable law-Dismissal was procedurally unfair as verdict of guilty was given absent a charge(s) encapsulating the additional reasons for dismissal cited in management's letter of dismissal addressed to the first respondent-Compensation for procedural unfairness amounts to solatium-compensation discretionary.*

## **JUDGMENT**

### **Introduction**

[1] The applicant, VIP Protection Services (Pty) Limited (the employer) approached this Court in terms of Section 85 (4) (b) of the Industrial Relations Amendment Act<sup>1</sup> (IRA) to review and set aside the arbitration award of the second respondent (the arbitrator) made under case number SWMZ: 94/17

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<sup>1</sup> Act No. 6 of 2010

dated 7 June 2018. In terms of the arbitration award, the arbitrator found that the dismissal of the first respondent (the employee) was substantially fair but procedurally unfair.

[2] In August 2015 the first respondent was employed by the applicant on a fixed term contract for a period of eighteen months, as an investigator in the criminal investigation department (CID). The first respondent's employ was terminated following an internal disciplinary process in December 2018.

[3] Dissatisfied with the dismissal, the first respondent reported a dispute of unfair dismissal to the third respondent (CMAC). At CMAC, the matter was a subject of an arbitration process whose award was delivered on 7 June 2018. Following the arbitrator's finding that the first respondent's dismissal was substantively fair but procedurally unfair, the applicant was ordered to pay the first respondent a sum of nine thousand Emalangeneni (E9,000.00).

[4] Disenchanted with that decision, on 6 July 2018 the applicant filed a Notice of Motion and applied that the arbitration award be reviewed by this Court.

### **Jurisdiction**

[5] As indicated above, the application is brought in terms of section 85 (4) (b) of the IRA Amendment Act which states as follows:

**‘A party who is aggrieved by a determination made by an arbitrator in terms of paragraph (a) may apply, within a period of twenty-one (21) days after the making of such determination, to the High Court for a review’.**

[6] The import of the above provision is that it arrogates exclusive jurisdiction to this court to review an arbitrator’s award in terms of the IRA. I am in no doubt that the present proceeding relates to the review of an award issued in terms of the IRA. In my view the matter is properly before this court because all the jurisdictional issues and facts that bring it within the ambit of the IRA have been met; for that reason, this court is properly placed to consider the merits of the application for review.

## **Background**

[7] The applicant is a company specializing in the provision of security services. The first respondent was employed by the applicant in August 2015 as an investigator in its criminal investigation department. Following an internal disciplinary process, the first respondent was found guilty of the offence of unauthorized use of the applicant’s motor vehicle—a dismiss-able offence in terms of the applicant’s disciplinary Code. The first respondent was dismissed on 22 December 2016. On 18 January 2017, the first respondent unsuccessfully appealed the recommendations of the Chairperson of the internal disciplinary hearing.

[8] Aggrieved by the outcome of the appeal, the first respondent reported a dispute of unfair dismissal with the third respondent. The matter was

arbitrated by the second respondent acting under the auspices of the third respondent. The second respondent found that the first respondent's dismissal was substantively fair but procedurally unfair.

[9] I should say the award reads like a judgment of any of our Superior Courts in terms of content and language, in terms of the weighing of the evidence, and in terms of the application of the law, and in terms of the findings on the facts and the law. I should observe that this is not surprising; the arbitrator is a lecturer in law.

[10] I can do no better than reproduce a portion of the arbitrator's award in this regard which states as follows<sup>2</sup>:

*charges disciplinary unauthorized Indeed to the charged.* [4.9] *It was the applicant's case that his dismissal was procedurally unfair because the respondent dismissed him for reasons that were not part of the that were leveled against him, and which he was called to answer at his hearing, It is common cause that the applicant was charged with the use of the company vehicle on the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 16<sup>th</sup> of December, 2015. he was called to answer that charge at the disciplinary hearing. According findings of the chairperson of the said hearing, the applicant was guilty as The chairperson went on to recommend summary dismissal.'*

*the letter The said disciplinary company* [4.10] *That having been said and done the respondent's management then wrote a letter of dismissal, in pursuance of such recommendations. According to of dismissal dated 22<sup>nd</sup> December, 2016, the applicant was duly dismissed. letter made reference to the recommendations of the chairperson of the hearing. The letter however proceeded to state a litany of reasons why the could no longer trust the applicant. These are listed herein below:-*

*a) Unauthorized use of the motor vehicle during working hours.*

*b) Attending to have the managing director and the Human resources manager arrested by making false accusations, and unfounded claims to the police*

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<sup>2</sup> See pages 43-44 of the Book of Pleadings.

c) *Causing the said Chris Mlaba to go with him on personal errands during working hours.*

d) *Claiming an hourly rate of remuneration writing to his contract of employment.'*

*to his employment. despite what respondent which he*  
[4.11] *It is quite evident that reasons (b), (c) and (d) were not part of the charge that the applicant had to face at the disciplinary hearing, although much consternation, these formed part of the reason he was terminated from It is trite that only the employer has the right to dismiss the employee, the chairperson might have said in his recommendations. So, in casu the dismissed the applicant for the reasons stated in the termination letter, had not been called to answer at the disciplinary hearing.'*

*reasons clearly amounts amounts to a*  
[4.12] *The learned author Grogan J 'Workplace Law', 8<sup>th</sup> edition, page 193 also states that the purpose of holding the disciplinary enquiry is to provide a platform at which to lead evidence in his defence, and to challenge the evidence led against him by the employer. In casu, the right of the applicant was clearly infringed because he was deprived of his legal right to do all of this with regard to (b), (c) and (d) which were contained in his letter of dismissal. This to a procedural defect in the applicant's dismissal. This clearly amounts to a procedural defect in the applicant's dismissal.'*

[11] The arbitrator based some of her reasoning on the letter of dismissal that was served on the first respondent by applicant's management which is captured in the following manner:

**VIP Protection Services**

**P.O. Box 591**

**Matsapha**

**Dear Sir,**

**Re: Termination Letter**

**This correspondence serves as a notification of the outcome of your disciplinary hearing that was held from the 4<sup>th</sup> January 2016 at VIP Protection Services Headquarters in Matsapha, where you were charged with the following charges:**

**1. Sic Dishonest**

2. Threatening Chris Mlaba
3. Unauthorised use of company vehicle on the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 16<sup>th</sup> December 2015
4. *Sic* Refuse doing reports
5. Insubordination

*Sic* This however four (4) of the charges were removed and left with one charge of which you were to defend yourself on, which is charge three (3); unauthorized use of company vehicle.

The above offence is very serious offence and you were found guilty as charged. The chairman of the disciplinary hearing found you guilty and recommended that your services be terminated, hence, in the circumstances your services are hereby terminated with immediate effect.

Your relationship with the company is lost and the company doesn't trust you anymore, following the incidents that took place as mentioned below:

- You have been found guilty *sic* on unauthorized use of the company vehicle, as *sic* yourself who was supposed to be on duty but you were not.
- Attempt to put your Managing Director and Human Resources Manager under arrest by making false accusations through a report dated 15<sup>th</sup> January 2016 which was delivered to the Police and Directors of the company.
- Affecting the RSSC VIP manager on their duty, always go with Chris Mlaba when doing *sic* you personal things to cover that you were on duty, this was bringing two men not on duty and open up the shortage of management and they were not even able to close it as you did not cooperate with them as you were doing personal things.

Claiming hourly rate when your contract states clear *sic* not paid on hourly rates even your cooperative manager Shabangu did attempt it.

Therefore, you are advised to return all company property as the company wont pay you your last payment without receiving all the company property that is with you.

If, in your opinion, you do not believe the dismissal is fair, you have five working days, starting from the following day after receiving your verdict, in which to exercise your right to appeal against this decision'.

Signed by the General Manager on 22 December 2016. Acknowledged by the employee and witnessed on 23 December 2016<sup>3</sup>.

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<sup>3</sup> Refer to pages 74-75 of the Book of Pleadings, Annexure 'MH1'.

[12] Having reasoned in the manner outlined above, the second respondent ordered the applicant to compensate the first respondent with a total amount of nine thousand Emalangeneni (E9,000.00). At the time of dismissal, the first respondent earned an amount of three thousand Emalangeneni per month and had three months of his employment contract remaining.

### **Applicant's Grounds for Review**

[13] Dissatisfied with the award, on 6 July 2018 the applicant approached this Court seeking a review and setting aside of the arbitration award on the following grounds:-

1. That the arbitrator committed a reviewable error of law when she deviated from the recommendations of the chairperson of the internal disciplinary hearing by finding that the dismissal was procedurally unfair when the chairperson had dismissed the first respondent for unauthorized use of the company motor vehicle during working hours.
2. That the arbitrator committed an irregularity when she took into account the litany of reasons (stated in the letter of dismissal) which were cited as the basis for first respondent's dismissal even though he had not been called to answer for the said reasons at the disciplinary hearing. It is applicant's lamentation that reasons (b), (c) and (d) (in the letter of dismissal) ought to have been discounted by the arbitrator as they were not the main reason the first respondent was dismissed.



## **The First Respondent's Grounds for Review**

1. In rebuttal, the first respondent argued that the present application for review is flawed in so far as it is not in compliance with the common law requirements of a review application as envisaged by section 19(5) of the IRA which states as follows:

**'A decision or order of the Court or arbitrator shall at the request of any interested party, be subject to review by the High Court on grounds permissible at common law.'**

2. The first respondent contended further that the second respondent was correct to hold that his dismissal was procedurally unfair because he was never charged nor was he called upon to plead or lead evidence in rebuttal during the disciplinary hearing of reasons (b), (c) and (d) stated in his dismissal letter during the disciplinary hearing.
3. The first respondent argues further that it was procedurally unfair to hold a sham disciplinary hearing and dismiss him as it appears the decision to dismiss him was taken not as a result of the verdict of guilty to the charge he was facing but as a result of other reasons unrelated to the charge he was convicted of.

## **Process of Resolution of Industrial Disputes**

- [14] Before I deal with the applicant's grounds for review, it is important to make this important point: the process of resolution of an industrial dispute under the IRA involving a complaint of unfair dismissal, as is in the case *in casu*, goes along a statutory continuum, starting with charging an errant employee with misconduct, through internal disciplinary hearing followed by an

internal appeal hearing to which the employee is entitled and a referral to arbitration if a party is dissatisfied with the outcome. At arbitration, the matter is heard and the arbitrator has recourse to the records of the internal disciplinary proceedings. Every point of the statutory continuum is important; and so, the record of proceedings of the internal disciplinary hearing and the internal appeal hearing are relevant for the purposes of arbitration.

[15] Consequently, an arbitrator cannot, as a matter of law and common sense ignore the findings recorded in the record of proceedings of the internal disciplinary hearing when, a fortiori, it is at the internal hearings-not at the arbitration proceedings that an employer gets the chance to establish that he has had a valid and fair reason to dismiss the errant employee and that he has followed a fair procedure in doing so.

[16] Contrary to the applicant's intimation that it was irregular of the arbitrator to take into account the additional reasons for dismissal cited in management's letter of dismissal, the arbitrator was, by law on point in taking those reasons into consideration. The additional reasons for dismissal are part of the record relating to the internal disciplinary process of the first respondent as such, could not be disregarded by the arbitrator. It is for this reason that I find there is no merit in applicant's lamentation that it was irregular of the second respondent to take into consideration the other reasons for dismissal set out in first respondent's letter of dismissal.

## **Did Arbitrator Commit a reviewable error of law?**

[17] In considering applicant's ground of review that the arbitrator committed a reviewable error of law when she deviated from the recommendations of the chairperson of the internal disciplinary hearing and found that the dismissal was procedurally unfair when the chairperson had made no such finding, it is necessary to dispose of this ground for review by referring to the following extract from Grogan<sup>4</sup>:

**'Arbitration hearings are not merely reviews of the employer's decision to dismiss employees, or the propriety of procedures followed by the employer. They constitute a full rehearing on the merits plus an investigation of the fairness of the procedure followed by the employer.'**

[18] Arbitration proceedings are separate and distinct from an internal disciplinary hearing. During arbitration, the arbitrator is at large to reconsider and assess the evidence tendered before her anew. Ordinarily, the arbitrator is not at liberty to disregard the findings of the internal hearing unless there is failure to adhere to rules of natural justice and misapplication of the applicable law.

[19] In the present matter, and based on the arbitrator's award, it is apparent that the first respondent was never charged with what he is subsequently found guilty of in reasons b), c) and d) as stated in first respondent's letter of dismissal. Absent a charge or charges encapsulating the additional reasons for dismissal, the dismissal was procedurally unfair for failure to accord with the rules of natural justice. The first respondent was never afforded a chance to

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<sup>4</sup> 'Dismissal, Discrimination and Unfair Labour Practices' at page 563.

make representations pertaining, for instance to the issue of making false accusations to the police about the Managing Director and the Human Resource Manager; and Claiming hourly rates when his contract precluded him from making such claims. It is for this reason that I find there is not merit in this ground for review as well.

### **Compensation**

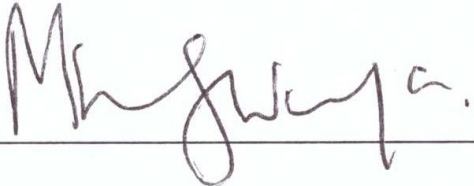
[20] Having found dismissal of the first respondent to be procedurally unfair, the arbitrator exercised a wide discretion to award compensation to the employee. Compensation for procedural unfairness amounts to a *solatium* for the unfairness committed. The arbitrator cannot, therefore be faulted for finding that it was just and equitable to grant relief equivalent to the period of three months which remained on the employee's fixed term contract.

[21] There is no reason in law or fairness as to why the applicant should not be ordered to pay costs of this review.

## Order

[22] In the result the following order is made:

- 1) The review is dismissed with costs



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**M. LANGWENYA J.**

For the Applicant:

Mr Gcina Mhlanga of Motsa Mavuso  
Attorneys

For the First Respondent:

Mr C. Bhembe of Bhembe & Nyoni Attorneys