

SOUTH AFRICA / JUDGMENT

Elundini Local Municipality v South African Local Government Bargaining Council (PR 21/21) [2022] ZALCPE 7 (11 May 2022)

[2022] ZALCPE 7

COURT

Labour Court Port Elizabeth

BEFORE

Lallie

CASE / FILE NUMBER

PR 21/21

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not

Reportable

CASE

NO: PR 21/21

In

the matter between:

ELUNDINI
LOCAL
MUNICIPALITY Applicant
and
SOUTH
AFRICAN LOCAL GOVERNMENT
BARGAINING
COUNCIL
First Respondent
MONDE
BOYCE N.O.
Second Respondent
SOUTH
AFRICAN MUNICIPAL WORKERS'
UNION
obo N.Y.
NKANI
Third Respondent

Heard:

21 October 2021

Delivered: This judgment was handed down electronically by circulation to the Applicant's and Third Respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing- down is deemed to be 15h30 on 11 May 2022.

JUDGMENT

LALLIE, J

[1] In June 2019 the applicant received a complaint that Ms Balfour (Balfour), a bidder for one of its tenders had not received tender documents she had requested and paid for. Having investigated the complaint, the applicant charged the individual third respondent Ms Nkani (Nkani) with gross negligence, gross dereliction of duties and gross dishonesty. The first 3 charges were based on Nkani's failure to provide Balfour with a bid document she had requested via

e-mail on 27 May 2019. The fourth charge is based on false information Nkani provided in an attempt to avoid responsibility for

the allegations against her. A disciplinary enquiry which was constituted against Nkani found her guilty of the first and fourth

charges, namely gross negligence and gross dishonesty. Nkani was issued with the sanction of dismissal. The third respondent challenged the fairness of Nkani's dismissal at the first respondent. The dispute was arbitrated by the second respondent (the arbitrator) who, in an award dated 8 February 2021, reversed the sanction of dismissal and issued Nkani with a written warning valid for six months. He further ordered the applicant to reinstate Nkani retrospectively from 11 February 2022, the date of her dismissal and

to pay her an amount of R77 211.24 minus statutory deductions. In this application the applicant seeks an order reviewing and setting

the award aside. The application is opposed by the third respondent.

[2] The applicant's main grounds for review are that the arbitrator disregarded material evidence, misconstrued evidence and failed to take into account the gravity of the misconduct which led to Nkani's

dismissal. The third respondent opposed the application on the basis that the applicant had failed to prove the elements of gross

negligence at arbitration and further failed to prove the unreasonableness of the award. She submitted that the applicant failed to prove that she made herself guilty of the misconduct she was dismissed for and to further prove the unreasonableness of the award. She insisted that based on the evidence tendered at the arbitration, the award is reasonable.

[3] The test for review based on errors made by the commissioner in the conduct of the arbitration is whether the errors the applicant seeks to rely on had the effect of distorting the commissioner's decision and rendering it unreasonable.[1] The applicant submitted that the commissioner perpetrated a gross irregularity in the conduct

of the arbitration proceedings. The applicant was required to determine whether the applicant's conduct of dismissing Nkani

for gross negligence and gross dishonesty was fair. The commissioner made a finding that there appeared to be no dispute that Nkani

committed the offence she was dismissed for. He noted that what appeared to be in issue was the appropriateness of the sanction of dismissal and whether the unprotected strike some employees of the applicant participated in at the time had a role in the commission of the misconduct. The commissioner found the sanction of dismissal too harsh on the basis that Nkani's conduct of not responding to Balfour's e-mail was neither deliberate nor constituted gross negligence because she was prevented by striking workers from having access to her work station. She therefore was unable to access her computer and respond to Balfour's e-mail.

[4] The applicant submitted that the commissioner committed a gross irregularity in disregarding material evidence in reaching the decision that the sanction of dismissal was harsh. The material evidence was that Nkani gave contradictory explanation for her failure to respond to Balfour's e-mail. In a letter dated 4 June 2019 Nkani acknowledged that Balfour's request was sent to her via e-mail on 27 May 2019. She further acknowledged that she did not respond to it. Her explanation for her conduct was that she did not recognize the e-mail because it was marked as read. She suspected that it might have been opened by learners who were permitted to use her computer and email.

[5] In the representations Nkani made in a letter dated 13 June 2019 giving reasons why she should not be suspended she said that it was an oversight and a mistake on her part that she failed to take note of Balfour's e-mail of 27 May 2019. Nkani's defence of being prevented by striking workers from reaching her work station was introduced later. All the evidence was presented at the arbitration but the commissioner elected to use Nkani's admission that she failed to attend to Balfour's request to support his finding that she showed remorse. The commissioner erred in disregarding the applicant's version that the different explanations Nkani provided proved that she contradicted herself and was deliberately deceitful.

[6] The commissioner could not reasonably determine the fairness of the sanction of dismissal without considering all the evidence the parties presented on whether Nkani had committed the misconduct she was dismissed for. Had the commissioner considered all the evidence as

he was obliged to, he would, as the applicant correctly argued, have concluded that the applicant had proved gross negligence and gross dishonesty against Nkani. The applicant further proved that the commissioner erred in finding that Nkani showed remorse. A remorseful employee admits having breached a rule and apologizes for the conduct. Such an employee does not attempt to exculpate herself or himself as Nkani did and impute his or her misconduct on others.

- [7] The totality of the evidence presented at arbitration was that Nkani failed to respond to Balfour's email in which she requested information she was entitled to. The applicant's version at arbitration was that Nkani's failure constituted gross negligence. The commissioner afforded Nkani an opportunity to present her own version of what happened. Her version was that she went to work on 27 May 2019 and found that getting access was not easy but she managed to force herself through. She only managed to clock in but could do nothing in her office which she was unable to access. Her direct evidence is recorded as follows:

She further stated that as she had been working and waiting for them to allow them into their work stations because she returned from leave on 27 May 2019. She managed to catch up with her work and saw Balfour's email on 31 May 2019 because it was marked as having been read on her computer. The tender whose documents Balfour had requested closed at noon on 30 May 2019.

- [8] The record supports the applicant's version that the commissioner erred in preferring Nkani's version because it was improbable. It reflects that Nkani testified that she returned from leave on 27 May 2019, which fell on a Monday, managed to clock in but prevented by striking workers from reaching her workstation and computer. Nkani contradicted herself by stating that 'On Thursday this whole thing happened of me not been able to get inside the premises'. That Thursday was 30 May 2019 the same day she complied with the instruction to return to work by 15h00. The material contradiction in Nkani's version complied with her admission in her submissions of June 2019 that her omission to respond to Balfour's e-mail was due to her oversight constituted sufficient proof of gross negligence.

- [9] The totality of the evidence presented at arbitration reflects that the commissioner had no valid grounds for rejecting the applicant's version that Nkani had made herself guilty of gross negligence. The commissioner erred in basing his decision on the applicant's failure to prove that Nkani was not prevented from accessing her computer. It was Nkani who raised her inability to access her computer as a defence. Nkani therefore bore the burden of proving her defence which she failed to do. The commissioner erred in not taking the gravity of Nkani's omission into account and its effect on

the applicant's reputation. Balfour's evidence of the negative impact the omission had on her livelihood as it denied her of the opportunity to obtain a 3 year tender with the applicant.

- [10] The commissioner erred in finding that Nkani showed remorse because the evidence before him proved that she did not. As the commissioner had found that Nkani had committed the offence she was dismissed for, had he found that she failed to show remorse, he would have

decided that the sanction of dismissal was appropriate. The applicant therefore established that the commissioner erred in rejecting its version that dismissal was inappropriate. Even item 3 (4) of schedule 8 to the LRA, the Code of Good Practice: Dismissals, the commissioner sought to rely on does not support his decision in that the applicant proved the gravity of the misconduct Nkani was dismissed for, her dishonesty and lack of remorse. The conclusion that the dismissal was

inappropriate was therefore disconnected from the evidence tendered at arbitration. The remedy an arbitrator may grant is prescribed in section 193 of the LRA. It is reinstatement, re-employment or compensation. The CCMA has no inherent jurisdiction. It can exercise

only the authority it has been granted by the legislation. The commissioner lacked the authority to decide the sanction afresh as his powers were limited to the prescribed remedies. His decision to substitute the sanction of dismissal with a written warning was unreasonable. The applicant established that the award falls outside the bounds of reasonableness and stands to be reviewed and set aside.

[11] The applicant sought an order substituting the second respondent's award. I have considered the submissions on behalf of the parties before me on the issue. I am not convinced by the applicant's arguments that the record contains sufficient information which will place me in a position to determine the fairness of Nkani's dismissal. The reason is that in conducting the arbitration the commissioner asked Nkani to present her version of events. He, however, kept interrupting her as a result Nkani's version on the record raises a lot of questions. The record is silent on material aspects of her defence. It fails to reveal Nkani's full version of what happened between 27 and 30 May 2019. A decision on the fairness of Nkani's dismissal cannot be taken without affording the third respondent an opportunity to present Nkani's defence in full.

[12] I could find no reason in fairness to grant a costs order against the third respondent.

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

Order:

1. The arbitration award issued by the second respondent under case number ECD 022019 dated 8 February 2021 is reviewed and set aside.
2. The matter is remitted to the first respondent to be arbitrated de novo by an arbitrator other than the second respondent.
3. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

[1] Head of the Department of Education v Mofokeng and others (2015) 36 ILJ 2802 (LAC).

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Prepared on 11 October 2026 · Esheria