

SOUTH AFRICA / JUDGMENT

Jacobs v KwaZulu-Natal Treasury (DA7/20) [2021] ZALAC 50; [2022] 3 BLLR 269 (LAC); (2022) 43 ILJ 1286 (LAC) (9 December 2021)

[2021] ZALAC 50

COURT

Labour Appeal Court

BEFORE

Waglay, Davis, Kubushi

CASE / FILE NUMBER

DA7/20

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LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

DA7/20

In the matter between:

NATASHA DONNA

JACOBS Appellant

and

KWAZULU-NATAL

TREASURY Respondent

Heard: 05

November 2021

Delivered: 09

December 2021

Coram: Waglay

JP, Davis JA and Kubushi AJA

JUDGMENT

KUBUSHI AJA

- [1] The crux of this appeal is whether an employer may invoke a confidential agreement to conceal wrong doings in the workplace, and whether an employee who has signed a confidentiality agreement requires the permission of the employer to reveal wrongdoings in the workplace, particularly when the information is required in legal proceedings, in this matter, in the arbitration proceedings.

- [2] The appellant, was charged and dismissed for misconduct concerning the allegations that the appellant breached an obligation to keep confidential information pertaining to a recruitment and selection process to which she was privy to by reason of her position as a member of the selection committee. It was alleged that the appellant breached such confidentiality agreement when she disclosed some information pertaining to the recruitment process, in an affidavit tendered as evidence in arbitration proceedings (unrelated to these proceedings), without first obtaining the permission of the employer.
- [3] The dismissal dispute was referred to the relevant bargaining council. The pivotal finding of the arbitration turned on the veracity of the affidavit in question, particularly in connection with whether the appellant was telling the truth when she stated in the affidavit that the minutes of the selection panel were amended, and whether she required the permission of the employer before the information in the affidavit was released. The commissioner found the appellant not honest when she stated that the minutes were amended. The arbitrator, further, found that the appellant breached the confidentiality agreement when she did not seek permission to disclose the information attested to in the affidavit. Consequently, in the arbitration award issued by the arbitrator, the appellant's dismissal was found to be procedurally and substantively fair.
- [4] The dispute eventually ended before the court a quo on review. The appellant challenged the arbitration award, alleging that the commissioner committed several reviewable irregularities which amounted to her rendering the award that no reasonable commissioner could have rendered. The decisive finding of the court a quo was that it had no power to review the finding by the arbitrator that the appellant was dishonest when she stated under oath that the minutes of the selection panel were amended. The finding was reinforced by the court a quo's reasoning that the appellant chose to pursue the review application without the full record of the arbitration, thus making it impossible for the court a quo to determine the credibility of evidence tendered by the appellant's witnesses at the arbitration proceedings. Consequently, the court a quo confirmed the arbitration award that the dismissal of the appellant was procedurally and substantively fair, and, dismissed the appellant's claim for relief.
- [5] The appellant aggrieved by the judgment and order of the court a quo, has approached this court, leave to appeal having been granted on petition to this court, to appeal against the entire judgment and order of the court a quo.
- [6] It became obvious during the deliberations in this court that the core issue would turn on the truthfulness and/or falsity of the affidavit in question. The parties were, also, in agreement that should the affidavit be found to be truthful, the issue of the confidentiality agreement would fall away. Primarily, the question was whether the minutes of the selection committee had been changed. If it was to be found that the minutes were indeed changed, then, it would mean that the appellant's affidavit was not false, and if it is so, the issue of the confidentiality does not arise.

- [7] The appeal is opposed only by the first respondent, and for convenience, I shall in this judgment refer to the first respondent as the respondent.

Factual Matrix

- [8] The facts upon which the appeal is based are mostly common cause and are gleaned from the record of the proceedings. The appellant was employed with the respondent in 2015 as Director: Supply Chain Management, until her dismissal in 2017. At the time of her dismissal, she had been employed in the Public Service for twenty-one (21) years.
- [9] The incident that is the subject matter of this appeal occurred in 2009, when the appellant was in the employment of KwaZulu-Natal Department of Community, Safety and Liaison (“the Department of Community, Safety and Liaison”). The appellant was, then, tasked as a member of a panel constituted to recommend a candidate for appointment to the position of Assistant Manager: Assets and Logistics. The other members of the selection panel included Ms Buthelezi, the chairperson of the panel, Mr Siphengane and Mr Ashley Naidoo. Mr Parthab acted as the secretary of the panel.
- [10] In her capacity as a panel member, like other panel members, the appellant signed a Disclosure and Confidentiality Agreement (“the Confidentiality Agreement”). In terms of the said Confidentiality Agreement, the appellant undertook to keep confidential and not disclose or discuss with any person apart from the panel members and the Human Resources representative, in any direct or indirect manner, any matters raised in any part of the shortlisting/interviews or any related matter not mentioned therein. She, further, acknowledged that she could be subjected to disciplinary action if she breached the said confidentiality obligation, by disclosing, either verbally or in writing or by any other means, any matters raised in any part of the shortlisting/interviews.
- [11] In terms of the job advertisement, candidates were required, amongst others, to have detailed working knowledge of various applicable policies and legislation and to be proficient in a computer program known as HARDCAT. The appellant was responsible for setting the test for the potential candidates on the HARDCAT system whilst another panel member, Mr Ashley Naidoo, was responsible for evaluating the scores of each of the candidates.
- [12] Each of the shortlisted candidates was subjected to a computer literacy test on the HARDCAT program, followed immediately by an interview comprised of a set of specific questions. According to the evidence of the appellant, after the selection process was finalised, two candidates, Ms Van der Merwe and Ms Jamile, were found to have performed very well, but it was decided that Ms Van der Merwe be recommended for the appointment as she had obtained a higher score than Ms Jamile in the HARDCAT test.
- [13] It is alleged that a few weeks after the panel discussion in which Ms Van der Merwe was recommended for appointment, the appellant received the minutes of the selection panel from Mr Parthab for signature. It became apparent to the appellant that the minutes did not

reflect the correct position as to the person recommended for appointment by the selection panel. In the minutes, Ms Jamile was, according to the appellant, incorrectly referred to as the candidate for appointment. The appellant refused to sign the minutes and took the matter up with Ms Buthelezi and was informed by Ms Buthelezi that it was her (Ms Buthelezi) prerogative to change the minutes. The appellant ended up reluctantly signing the minutes when she was informed by Mr Ramsamy, her supervisor at the time, that the Head of Department had advised that she sign the minutes because of the various investigations that were taking place in the department

regarding, inter alia, vacant posts. Thus, the appellant signed the minutes even though she knew the minutes did not reflect the correct status of what happened during the deliberations of the selection panel.

- [14] This evidence of the appellant is denied by the respondent whose evidence is that the panel members had unanimously agreed that Ms Jamile was the candidate to be recommended for appointment, and that the minutes were signed by all the members of the panel, as well as the appellant.
- [15] In 2015, when she was already in the employ of the respondent, the appellant was approached by a representative of the labour union, NEHAWU, Mr Vusi Gama ("Mr Gama"), with a request to give evidence, relating to the 2009 selection process, in arbitration proceedings between the Department of Community Safety Liaison and a certain Ms Nelsen ("the Nelsen arbitration"). The appellant was informed by Mr Gama that the commissioner in the Nelsen arbitration had, with the consent of the parties therein, ruled that the said evidence be presented to the commission in affidavit format. Mr Gama was representing Ms Nelsen in that arbitration.
- [16] When he approached the appellant for the affidavit, Mr Gama already had, in his possession, copies of all the documents from the recruitment/selection process and a settlement offer to Ms Van der Merwe, who had lodged a claim against the department. The documents had been provided by Mr Kgomo Malatji, an official of the Department of Community, Safety and Liaison, who was representing the department in the Nelsen arbitration.

Disciplinary Process

- [17] A year later the appellant was charged by the respondent for disclosure of confidential information through a sworn affidavit without being authorised by the department of Community Safety and Liaison and the submission of a false statement or evidence to the department when she responded to allegations of misconduct against her when she said she provided an affidavit in respect of arbitration at the request of the legal administrative officer for the department of Community Safety and Liaison. In the disciplinary enquiry that ensued, the appellant was found guilty of both charges and dismissed.

Arbitration Process

- [18] Not satisfied with the outcome of the disciplinary enquiry, the appellant referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council (“GPSSBC”) for arbitration. At the arbitration, the appellant testified in her defence and called two witnesses, Mr Ramsamy and Mr Gama, to testify on her behalf. The respondent, on the other hand, called Ms Buthelezi, Mr Siphengane, Mr Parthab and Ms Van der Merwe as witnesses.
- [19] During the appellant’s arbitration, it was claimed that the allegations contained in the appellant’s affidavit submitted at the Nelsen arbitration, were false and injurious to the Department of Community, Safety and Liaison.
- [20] In her defence, the appellant, amongst others, contended that the affidavit was submitted for a lawful purpose, namely for a legal process, a bargaining council arbitration, and if, as they claim she made false statements in her affidavit, there could not have been a breach of confidentiality.
- [21] After the deliberations, the arbitrator found, amongst others, that the appellant had deposed to an affidavit that was not true and that she lied. She found, also, that while the affidavit was for a legal process, for disclosure to a bargaining council arbitration, the appellant had not sought permission to release such statement/such information. The arbitrator, as a result, concluded that the appellant’s actions constituted misconduct of such a serious nature that her twenty-one (21) years of service and clean disciplinary record could not save her from dismissal. Consequently, the arbitrator found the dismissal to be procedurally and substantively fair and that dismissal was the appropriate sanction.

Court a quo process

- [22] Before the court a quo, the appellant sought a determination of whether there was a basis on which the appellant can claim that the finding of the arbitrator was a gross irregularity that required interference by the court a quo. The crucial issue, according to the appellant, turned on the arbitrator’s finding that the affidavit in question was false. The appellant is said to have submitted an incomplete record of the proceedings of the arbitration and elected to proceed with that incomplete record.
- [23] As regards the veracity of the affidavit, the court a quo made a finding that “during cross-examination of the applicant [the appellant], First Respondent’s representative appears to admit that his own witness, Parthab, had indicated that the minutes were changed at the behest of the chairperson of the panel, one Buthelezi. In fact, it appears that he himself admitted this”.
- [24] Despite this finding, the court a quo declined to interfere with the arbitrator’s factual finding that the appellant’s affidavit was not true. The reason for such refusal is given in the judgment as the appellant’s failure to include a record of all the evidence that was relevant to the arbitrator’s factual finding, in that, the record of the arbitration proceedings did not include all the evidence of the witnesses who testified on this aspect. The court a quo, also,

found that it was not unreasonable for the arbitrator to find that a panel member can breach her confidentiality obligation if she made any statement about the confidentiality process.

Analysis

[25] It is common cause that the appellant stated the following in her contested affidavit:

‘I, the undersigned Natasha Jacobs state under oath that:

1. I am testifying as a witness in this matter. The facts contained in this affidavit are within my personal knowledge, unless it is clear from the context that they are not, to the best of my belief, true and correct.
2. In 2009 I was a member of the panel during the interviews for the post- Assistant Manager – Supply Chain Management – Asset and Logistics – Ref CSL 03/2009.
3. The minutes were taken during the interviews for the post- Assistant Manager – Supply Chain Management – Asset and Logistics – Ref CSL 03/2009.
4. The minutes were subsequently changed after the interviews for the post- Assistant Manager – Supply Chain Management – Asset and Logistics – Ref CSL 03/2009.
5. Subsequent minutes did not really reflect what took place during the interviews for post- Assistant Manager – Supply Chain Management – Asset and Logistics – Ref CSL 03/2009.’

[26] Essentially, what the appellant attested to was that the minutes of the recruitment/selection process were subsequently changed after the interviews, and that the subsequent minutes did not really reflect what took place during the interviews.

[27] As already stated, if indeed the minutes were amended, it means that the appellant attested to the truth when in her affidavit she stated that the minutes of the recruitment/selection process were subsequently changed after the interviews, and the subsequent minutes did not really reflect what took place during the interviews. The only inference that can be made in the light of such evidence, if it is to be found to be true, is that the name of Ms Van der Merwe who was recommended for appointment was changed to that of Ms Jamile.

[28] It is now trite that the test for review is whether the decision reached by the commissioner is one that a reasonable decision-maker could have reached.[1] The Labour Appeal Court in *Khambule v National Union of Mine Workers and Others*,[2] when dealing with the applicable approach to a review, remarked as follows:

‘It needs to be restated that when considering a review, the reasoning of a commissioner is no guiding light in determining whether the decision or more particularly the “order” handed down is reasonable. Put differently, a court reviewing an award need not consider the commissioner’s reasoning to determine whether or not his/her reasoning justifies the award. The reviewing court as has been repeatedly held, must consider all the evidence led at the arbitration and in the light of that evidence determine whether the award is one which any commissioner in the position of

the commissioner, who determined the arbitration, could reasonably make. If the answer is in the positive, then there must be no interference with the award.'

- [29] In the current matter, the evidence that was tendered before the arbitrator by the appellant was that the minutes were changed. This evidence was corroborated by that of Mr Parthab, a witness for the respondent, who confirmed that the minutes were indeed changed. The evidence of Mr Parthab is vital, in this regard. He was the secretary of the selection committee and the person responsible for drafting the minutes. That the minutes were amended would be within his personal knowledge. On the basis of Mr Parthab's evidence, it is clear that the minutes were indeed amended.
- [30] In oral argument, in this court, counsel for the respondent conceded, as well, that the minutes were amended. Counsel, also, submitted in oral argument in this court that it had been established at the arbitration proceedings that it was common cause that the minutes were changed. He, however, sought to argue that although the minutes were changed the changes were unanimously agreed to by the panel members when they affixed their signatures to the new minutes, which minutes were also signed by the appellant. This argument, in my view, does not change the factual situation that the minutes were amended, nor does it take the respondent's case anywhere. Fact is, the minutes were amended.
- [31] Consequently, it can be safely said that on the basis of the evidence led at the arbitration which proved that the minutes of the selection panel were changed, and in the light of the fact that it was common cause that the minutes of the selection panel were changed, which was further conceded by counsel for the respondent, it is evident that the arbitration award is one which a decision-maker in the position of the arbitrator could not have reasonably made. It being so, the court a quo should have found that, the award made by the commissioner in this matter, is not an award that any commissioner in her position, could have reasonably made. Consequently, the court a quo ought to have set the arbitration award aside.
- [32] Even though the respondent's counsel ended up conceding that before the arbitration it was common cause that the minutes of the selection panel were changed, he, however, sought to argue that, before the court a quo, there was no evidence to substantiate the appellant's allegation that the information in the affidavit was truthful, this due to the fact that the appellant did not provide the full record of the proceedings at arbitration.
- [33] Counsel's argument is, in my view, misplaced because in actual fact the missing record was not required to prove the appellant's averment that the minutes were amended. This is so because, firstly, it was common cause, as I have earlier indicated in this judgment, that the minutes were changed. There was, therefore, no need for the appellant to prove this point. Secondly, in her founding affidavit before the court a quo, the appellant stated the following:

'12. A few weeks later, I was requested by the secretary of the panel, Mr Parthab, to sign the minutes of the appointment panel. I noted immediately that Ms Van der Merwe was not the recommended candidate anymore, but Ms Jamile was now preferred. I refused to sign the minute and advised Parthab that I was not in apposition to do so, and he advised me that the Chairperson of the Panel had instructed him to change the minute and that I should discuss the same with the Chairperson. I then approached the chairperson to raise concerns, but she advised me that her decision was final. I then reported to my supervisor, Mr Ramsamy, that the minuted recommendation had been amended. He asked me to speak to the Chair of the panel, Ms Buthelezi, which I again did. The latter informed me that she was the Chair and she could amend the recommendation if she wanted to. I then reported to Ramsamy again, and he told me that he would speak to the Head of the Department about the matter. He later returned to me and said that the HOD had advised that I sign the minute because of the various investigations that were taking place at the department regarding, inter alia, vacant posts. I then reluctantly signed the minute, not wanting to cause any trouble or endanger my own occupation."

- [34] The respondent in its answering affidavit puts all these allegations by the appellant into dispute and does not proffer an appropriate answer thereto. The result is that having gone through all the evidence, there is nothing to suggest that the appellant's version of events is incorrect. Effectively, there is actually nothing from the respondent to gainsay the version of the appellant which was before the court a quo, that would enable this court to reject her version.
- [35] In essence, in trying to defend the arbitration award, which was obviously wrong, the respondent in his answering affidavit tendered averments which are incorrect. By not responding to the appellant's averments as stated above, it means the averments were admitted; in particular, the averment that the minute was amended to reflect Ms Jamile as the preferred candidate whilst the selection panel had opted for Ms Van der Merwe.
- [36] Significantly, the deponent to the answering affidavit, Mr Ndumiso Artwell Nkomo, attested to the answering affidavit well knowing that the averments therein were incorrect for he ought to have known that the minutes were changed.
- [37] Furthermore, the appellant, in my view, did not breach the confidentiality agreement by tendering such evidence before the Nelsen arbitration. It would be a great travesty of justice if this court were to make a finding that supports the respondent's version that the appellant breached the confidentiality agreement when giving evidence in an arbitration process or that she breached the confidentiality agreement when she disclosed the irregularities and/or dishonesty that were committed by members of the selection panel at a hearing related to what transpired at the selection panel.

[38] It is, also, my view that an employer may not invoke a confidential agreement to conceal wrong doings in the workplace and an employee who has signed a confidentiality agreement does not require the permission of his or her employer to reveal wrongdoings in the workplace if required to do so in legal proceedings. If permission is to be obtained first, any dishonest conduct will never see the light of day.

[39] The court a quo, also, made such a finding. It expressed itself as follows in its judgment when considering this issue:

‘To my mind, whether misconduct was committed by Applicant really turned on this point. An employer may not use confidential agreements to conceal wrongdoings in the workplace and an employee does not require the permission of his or her employer to reveal the truth to a legal process, such as a court or arbitration proceedings.’

[40] The respondent’s counsel, as well, conceded that a confidential agreement may not be invoked to conceal wrongdoing in the workplace. The following is said in the respondent’s Heads of Argument:

‘18.1 It is at least arguable that it is not the purpose of the confidentiality obligation to allow panellists to cover up substantial irregularities. Consequently, it is arguable that the Appellant would not have committed misconduct if her affidavit was genuinely intended to disclose and/or report substantial irregularity. The Arbitrator, therefore, needed to determine whether the allegations in the affidavit were true and/or whether the minutes had been changed to misstate the unanimous recommendation of the panel.’

[41] Although, in the Heads of Argument it appears as if counsel was uncertain whether such is the case, however, in oral argument, in this court, he conceded that it is so. He agreed that the confidentiality of information does not force a person to keep quiet if there is some dishonesty or irregularity in the panel.

[42] On the back of such concession, counsel however, sought to argue that, in this matter, the confidentiality agreement was breached before the evidence was tendered in the arbitration proceedings. The submission being that the breach occurs when the person who signed the confidentiality agreement approaches one of the parties and inform that party about the confidential material. In this matter, the proposition by counsel is that the confidentiality obligation was breached at the time the appellant approached a government employee, presumably Mr Gama, and disclosed the confidential information to him. Counsel was, nevertheless, at great pains to indicate evidence on record where it is stated that the appellant approached an employee (or even Mr Gama) and divulged the confidential information before she tendered evidence at the arbitration.

[43] The uncontested evidence on record is that Mr Gama, who was at the time involved in the Nelsen arbitration and was in possession of the documents relating to the 2009 selection process, is the one who approached the appellant. And, in any event, whether the appellant approached Mr Gama or it is Mr Gama who approached the appellant, is beside the point. The affidavit correctly records that the minutes were indeed changed after the meeting as the appellant alleges in her statement.

[44] Having found that the evidence at arbitration established that it was common cause that the minutes were changed, entails that the affidavit was not false and thus, the appellant in tendering the so called confidential information at arbitration did not breach the confidentiality agreement.

Costs

[45] In a recent judgment of the Constitutional Court in *Union for Police Security and Corrections Organisations v South African Custodial Management*,^[3] the court has upheld the trite principle applicable in labour matters that costs do not necessarily follow the successful party. Even though both parties argued for a costs order if successful, they have not persuaded me that this is a matter that warrants a costs order to be awarded.

[46] The appellant has, further, argued for costs orders to be awarded in her favour at arbitration, in the court a quo and in respect of the application for leave to appeal, should she be successful on appeal. The ground for a request for such costs orders is, according to the appellant, a consideration of the interests of fairness and justice. I am, however, of the view that the principle enunciated in *Union for Police Security and Corrections Organisations*, is apposite even in this instance.

Order

[47] Consequently, I make the following order:

1. The appeal is upheld.
2. The order of the Labour Court in case number D1475/18 is set aside and substituted with the following order:
 - 2.1 The Arbitration Award is hereby reviewed and set aside;
 - 2.2 The First Respondent is ordered to reinstate the Applicant to her employment position, with retrospective effect from the date of her dismissal, placing her in the exact position that she would have been in had she not been dismissed;
3. I make no costs order.

Kubushi AJA

Waglay JP and Davis JA Concur

APPEARANCES:

FOR THE APPELLANT: S MOODLEY

Instructed by Narain Naidoo and Associates

FOR THE RESPONDENT: DP CRAMPTON

Instructed by Mdledle Incorporated

[1] See Sidumo and Another v Rustenburg Platinum Mines Ltd & Others

[2007] 12 BLLR 1097 (CC).

[2] (JA89/17) [2019] ZALAC 61; (2019) 40 ILJ 2505 (LAC) (24 July 2019) at para 11.

[3] [2021] ZACC 26; 2021 (11) BCLR 1249 (CC).

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